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IN THE
SUPREME COURT OF THE UNITED STATES

_____TERM, 197___

NO. 73-942

JAMES P. O'NEILL, SR., ET AL
Petitioners

VS

JOSEPH EDWARD CRAIG

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Jacob G. Hornberger
915 Victoria Street
Laredo, Texas 78040
Counsel for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 197___

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NO. _____

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JAMES P. O'NEILL, SR., ET AL

Petitioners

VS

JOSEPH EDWARD CRAIG

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PETITION FOR A WRIT OF CERTIORARI

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AND

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_____

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The petitioners, James P. O'Neill, Sr., Maria V. O'Neill and Florencia Vidaurri, pray that a writ of certiorari issue to review the opinion and judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas rendered in these proceedings on April 12, 1973; to the order of that court dated May 3, 1973, overruling Petitioners' Motion for Rehearing; to the Order of the Supreme Court of the State of Texas dated July 25, 1973, denying the Petitioners' Application for Writ of Error with a notation "Refused. No reversible error;" and to the order of the Supreme Court of Texas dated September 25, 1973, overruling Petitioners' Motion for Rehearing.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas, reported in 493 SW2 898, appears at Appendix A, infra, pages 3 - 18 . The order

of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas overruling Petitioners' Motion for Rehearing in that Court appears at Appendix B, infra, page 19 . The order of the Supreme Court of Texas refusing the application for writ of error dated July 25, 1973, appears at Appendix C, infra, p. 21 . The order of the Supreme Court of Texas overruling the Motion for Rehearing dated September 25, 1973, appears at Appendix D, infra, p. 22 . The opinion of the Court of Civil Appeals conditionally granting Petitioners' Motion to Stay Judgment or Mandate appears at Appendix E, infra, p. 23- 26 .

In the Court of Civil Appeals for the Thirteenth Supreme Judicial District the Cause was No. 752. In the Supreme Court of Texas, the Cause was No. B-4055.

JURISDICTION

The order or judgment of the Supreme Court denying Petitioners' Motion for Rehearing was entered on September 25, 1973. See Appendix D , infra, page 22 . This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under Title 28 USC Section 1257 (3).

QUESTION PRESENTED FOR REVIEW

This suit was brought in the 24th District Court of Goliad County, Texas, by the petitioners, all people of Mexican descent (except James P. O'Neill, who was in the Armed Services and overseas at the time of the accident and who was joined merely because he was the husband of Maria Vidaurri O'Neill). The case was submitted on special issues, and on the basis of the answers

to those issues, a judgment was rendered in favor of the defendant (respondent). The question arising out of this litigation is:

> Did the action of the trial court in refusing a timely motion for new trial based in part upon the fact that the jury hearing the case was not a fair and impartial jury; the action of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas in affirming the judgment of the trial court; and the action of the Supreme Court of Texas in denying Petitioners' Application for Writ of Error deny the Petitioners the fair and impartial trial to which they are entitled under the Constitution of the United States and deprive them of their rights under the 14th Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV to the Constitution of the United States.

" AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
United States Code Annotated-Constitution-Amendment XIV to end.

STATEMENT OF THE CASE

This suit was instituted in the 24th District Court of Goliad County, Texas, by Petitioners, James P. O'Neill, Sr., individually and as next friend of his minor children, James P. O'Neill, Jr. Donna Michelle O'Neill, and Linda Marie O'Neill, his wife, Maria V. O'Neill and his mother-in-law, Florencia Vidaurri, and Juan M. Soliz, all residents of Webb County, Texas, against the respondent, Joseph Edward Craig, a resident of Goliad County, Texas, for damages alleged to have been sustained as a result of a rear-end collision occurring on the main thoroughfare in Goliad, Texas, on the 24th day of November, 1967, between a parked vehicle occupied by the plaintiffs (Petitioners) and a vehicle being driven by the respondent. On December 16 and 17, 1971, the case was tried to a jury. It was agreed that the minor plaintiffs had suffered no injuries of

consequence, and damage issues were submitted only as to the plaintiffs (Petitioners), Maria V. O'Neill and Florencia Vidaurri. The amount of damage to the petitioners' vehicle was stipulated. The case was submitted to the jury on special issues, such special issues and the jury's answers thereto being attached hereto as Appendix F pages 29 thru 44 . During the deliberation of the jury and prior to the time that they had arrived at a verdict, the trial judge entered the courtroom and stated he had a note from the jury. That note read as follows:

"If we set money damages resulting from this occurrence does this mean we are setting blame?

S/Ada Sue Wells
Forelady"

The note was discussed,and, with the approval of all parties, the following answer was sent to the jury:

"Members of the jury: You are to consider the issues concerning damages independently of the other issues.

S/ Joe E. Kelly"

Shortly thereafter the jury answered the special issues as is shown in Appendix F . The testimony, in part, of the defendant, Joseph Edward Craig, as well as of the doctor insofar as it pertains to the injuries of the petitioners, and of the petitioner, Maria V. O'Neill, appears at Appendices G, H and I, pp. 49 thru 113.

Petitioners (Plaintiffs in the Trial Court) filed a Motion for New Trial and stated, among other grounds, that the plaintiffs (petitioners herein) were denied the fair and impartial trial to which they are entitled under the Constitution and laws of the State of Texas and of the United States of America and that the verdict was the result of passion, bias and prejudice. See Point Number

Twenty-Two of Plaintiffs' First Amended Motion for New Trial at Appendix J page 114 . At the hearing on this motion, counsel for Petitioners stated to the Court:

"In this connection, I will state to the Court that I made no effort to secure affidavits in this case, because I felt that the atmosphere was so hostile, that the feeling towards the clients that I had of Mexican descent was so adverse, that an attempt to secure jurors--secure affidavits would be completely useless. I felt, further, that the answers to the special issues, as propounded to the Court by the jury were so indicative of prejudice on their part, and the fact that they wrote this note to the Court, asking if they found damages, would that be setting blame, also was so indicative of the fact that they had made up their mind not to place any blame at all on the defendant, that it would be completely useless for me to try to get affida-

from them. And for that reason, I didn't. "

In response to this argument the Court replied in part:

"Because-- well, I well know that the old story of "me no Goliad, me no Alamo", well, that's true. But, at the same time, these people, I have seen the greatest error committed in the eyes of the Latin people to where that they knew more about the case than what the attorney did." The Court then overruled the Motion for New Trial.

After giving due notice of appeal, the case was appealed to the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas, and in their brief to the Court of Civil Appeals the petitioners, as one of their points upon which the appeal was predicated, stated:

"TWENTY-SECOND POINT: The answers of the jury to the Special Issues conclusively show that the plaintiffs were denied the fair and impartial

trial to which they are entitled under the Constitution and laws of the State of Texas and of the United States of America and that the said verdict was the result of passion, bias and prejudice. " See Twenty-Second Point of Error of Appellants' Brief to the Court of Civil Appeals, Appendix K page 115 .

This question was briefed and argued. The Court of Civil Appeals affirmed the judgment of the trial court and overruled Petitioners' Motion for Rehearing. Petitioners filed an application for writ of error with the Supreme Court of the State of Texas and alleged as one of their points of error that:

"NINETEENTH POINT OF ERROR :

The Honorable Court of Civil Appeals erred in overruling Appellants' Twenty-Second Point of Error and in affirming the judgment of the trial court, which Twenty-Second Point of Error reads

as follows:

"Twenty-Second Point: The answers of the jury to the Special Issues conclusively show that the plaintiffs were denied the fair and impartial trial to which they are entitled under the Constitution and Laws of the State of Texas and of the United States of America and that the said verdict was the result of passion, bias and prejudice.' " See Point No. 19 of Petitioners' Application for Writ of Error, appearing at Appendix L , p. 116 .

In Petitioners' Brief to the Supreme Court they stated as follows:

" The Court charged the jury in part as follows:

'1. Do not let bias, prejudice or sympathy play any part in your deliberations.'

'4. You must not decide who you think should win and then try to answer the questions

accordingly. Simply answer the questions and do not discuss nor concern yourselves with the effect of your answers.'

'These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions if will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.'

While the jury was deliberating, the trial judge entered the Courtroom and stated he had a note from the jury. That note read as follows:

'If we set money damages resulting from this occurrence does this mean we are setting blame?

S/ Ada Sue Wells
Forelady'

The note was discussed, and, with the approval of all parties, the following answer was sent to the jury:

'Members of the jury: You are to consider the issues concerning damages independently of the other issues.

S/ Joe E. Kelly'

Shortly thereafter the jury reported it was ready to return its verdict and to each of the damage issues they answered "0". Petitioner, Mrs. O'Neill, was awarded $146.00 medical. The petitioner, Mrs. Vidaurri was awarded $141.00 medical, but was awarded nothing for future medical. All issues, except one, were answered favorable to the defendant (respondent). That one issue was Special Issue No. 17, which inquired as to whether the petitioner, Florencia Vidaurri, should have remained inside the stopped vehicle.

"All of the petitioners involved in the collision were United States Citizens of Mexican descent. The jury was composed of ten Anglos, one Mexican-American (who it is submitted did not even realize he was on a jury) and one black.

On the hearing on the Motion for New Trial the Trial Judge stated in part as follows:

> (The Court): 'And, counsel, I can't agree with you with regard to discriminatory matters in Goliad County. I have tried a lot of cases in Goliad County. I don't mean that I was any better trial lawyer than you are. And I frankly never felt that. That's just a matter of opinion. You are almost putting the Court in a position of condoning your argument on the matter.
>
> Mr. Hornberger: No, sir.
>
> The Court: Because--well, I know that the old story of 'me no Goliad, me no Alamo.'

Well, that's true. But, at the same time, these people, I have seen the greatest error committed in the eyes of the Latin people to where that they knew more about the case than what the attorney did. I well recall one case that I think you alls' law firm had an offer of twelve thousand five hundred dollars and it was turned down in behalf of a person just because some outsider came in and told her not to take it. She wound up with nothing. It was a gamble. When they offered twelve thousand five hundred, the case was worth five hundred thousand dollars, though, if he won it.

"I couldn't say in that particular case that they didn't, Mr. Hornberger. I want to hear you completely. These parties were-- a question of the severity of the accident-- I mean, the extent of the injuries in there.

And if the parties failed to get their day in court, certainly they are entitled to it. But so far, I'd have to tell you at this point that the Court does not feel that there has been any abuse of justice in the matter.'

In response to the following question by counsel for Petitioners, the Court answered:

'Mr. Hornberger: Would the Court indicate to me his feelings on the note that the jurors wrote, that indicated that they were completely disregarding the instructions of the Court to answer each question separately, and actually what they had done was to determine who they wanted to win and then were finding the answers accordingly? I don't think there's any other indication a man can put on that note.

The Court: Well, I mean I think that all of our interpretation could be different.'

"The question of prejudice against people of Mexican descent was again argued before the Court of Civil Appeals. It was known by counsel for Petitioners, by previous investigation, that prejudice would be encountered in Goliad County and for that reason the son of the former County Judge of that County, who was raised in Goliad, was employed to try the case, so that at least one person on the side of the petitioners would have knowledge of the local people and of local conditions."

The Supreme Court of Texas denied the Application for Writ of Error and overruled Petitioners' Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

The decisions below directly conflict with the due process provisions of the Fourteenth Amendment to the Constitution of the United States in that the petitioners were not given a fair and impartial trial because of their racial background.

"Due process of law generally implies and includes a fair trial, free from suspicion of partiality, according to some settled course of procedure, and a reasonable time for preparation for trial. The right of a litigant to a trial in accordance with the forms of law is a vital part of due process, and the fact that the judgment of the court may be justified on the merits does not obviate the requirement of a fair trial as essential to due process of law." See 16A CJS 830, Section 624.

" The Supreme Court pointed out, at a fairly early date after the enactment of the Fourteenth Amendment, that some of the personal rights safeguarded by the First Eight Amendments against

national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. This is not because those rights are enumerated in the First Eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. The general test as to whether a right is so included in the due process clause of the Fourteenth Amendment was said to be: 'Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law.' Shortly thereafter affirming in principle what it had intimated before, the Supreme Court laid down the rule which is now the accepted and settled principle, that the due process clause requires that state action, through

one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." See 16 Am. Jur. 2d 644, Section 335; citing among other cases, DeJonge v Oregon, 299 US 353, 81 Led 278, 47 S Ct 255; and Gideon v Wainwright, 372 US 335, 9 Led 2d 799, 83 S Ct 792 and 93 ALR 2d 733.

While admittedly the federal constitution does not expressly guarantee the right of trial by jury in any state court in any character or case, and the due process clause does not require a jury trial in a state court (See Hughley v Board of Adjustment of the City of Dallas, 341 SW2 212, CCA Dallas, 1960, no writ history) if a jury trial is allowed, then the parties are entitled to a proper jury and to a fair and impartial jury. See 47 Am. Jur. 2d 644, Section 23.

In Hammett vs McIntyre, 249 P2d 885,

District Court of Appeal, California, 1952, the Court held that where attorneys for an insurance carrier represented both the insured automobile owner and driver, and the liability policy contained a provision extending coverage to persons operating the automobile with the named insured's consent, and an answer filed on behalf of the insured and driver including a denial that the automobile was operated by the driver with the insured's consent, the driver was deprived of the fair trial essential to due process and was entitled to a new trial.

In In Re Murchison, 75 S Ct 623, 349 U S 133, 1955, this Court stated:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v State of Ohio 273 U.S. 510, 532, 47 S Ct. 437, 444, 71 L Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13."

In Inland Steel Co. v National Labor Re-

ations Board, 109 F2 9, Court of Appeals, Seventh Circuit, 1940 , the Court, speaking through Circuit udge Major stated:

"That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In Tumey v Ohio, 273 U.S. 510, 535 47 S.Ct. 437, 445, 71 L.Ed. 749, 50 A.L.R. 1243, the court said: '* * * No matter what the evidence was against him, he had the right to have an impartial judge. * * *'

The court, in Jordan v Massachusetts, 225 U.S. 167, 176, 32 S.Ct. 651, 652, 56 L. Ed. 1038 said: 'Due process implies a tribunal both impartial and mentally competent to afford a hearing. * * *'

The principle is aptly stated in People v Naimark, 154 App. Div. 760, 139 N.Y.S. 418, 420, where it is said: '* * * The first

idea in the administration of justice * * * is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.'"

Certainly this same reasoning would apply to a jury as well as to a judge. See Rice v Rigsby 131 SE2d 469.

The case at hand is similar in some respects to that of Sandoval v Rattikin, 385 US 964, 87 S. Ct. 389, 1966. The Sandoval case was brought to this Honorable Court from the same Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas as is the case at hand. The Sandoval case also involved Mexican-Americans. Primarily, the point raised was that the petitioners had not been adequately represented in the trial

Court and that the refusal of the trial court to grant the timely motion for a new trial deprived petitioners of their rights under the Fourteenth Amendment. The petition for the writ was denied but the dissenting opinion was filed by Mr. Justice Fortis and Mr. Justice Douglas. There may have been mitigating circumstances in the Sandoval case, as is shown by the opinion of the Court in 395 SW2 889. But it is respectfully submitted that no mitigating circumstances are present in this case before the court.

The Supreme Court of Texas may make three notations on an Application for Writ of Error. In this case the notation was "Writ of Error Refused. No Reversible Error." Under the provisions of Rule 483 of the Texas Rules of Civil Procedure, this means that the Supreme Court was not satisfied that the opinion of the Court of Civil Appeals in all respects clearly declared the law, but was

of the opinion that the application presented no error which required reversal. See Appendix M page 117 .

Therefore, it is apparent that even the Supreme Court of Texas did not give its unqualified stamp of approval to what took place in Goliad County on the trial of this matter.

The prejudice of the jury is clear. They found that the defendant-respondent was keeping a proper lookout in the face of uncontradicted testimony that he was not. Then, to further compound their failure to abide by the Court's instructions that the jury must not decide who they thought should win and then try to answer the questions accordingly, and that they should not let bias, prejudice or sympathy play any part in their deliberations, they found that the vehicle which was being driven by the defendant was equipped with a lower beam headlight so aimed and of sufficient intensity as to reveal

persons and vehicles at least 100 feet ahead upon a straight, level, unlighted highway under normal atmospheric conditions. With that peculiar rationalization that only intolerant persons can conjure, the jury was satisfied that they had accomplished their high purpose of finding for the defendant and against these people of Mexican descent in spite of the facts until they came to the damage question. Realizing that the evidence was uncontradicted that the petitioners had been severely injured and suffered damages as a consequence, they knew that justice and obedience to their oath required that damaged be awarded. But, obviously a question was raised as to whether the true answer to these special issues would be detrimental to the cause of the local white Anglo-Saxon defendant. And so the question to the Judge:

"If we set money damages resulting from this occurrence does this mean we are

setting blame?"

Not being given the assurance that they desired, they then unanimously agreed to violate their oath and to award no damages to make absolutely certain that they were not placing any blame on the person they had decided must win this case.

The true effect of the verdict of this jury is that a Mexican or a person of Mexican descent travels on the streets of Goliad at his own risk with no rights or privileges whatsoever.

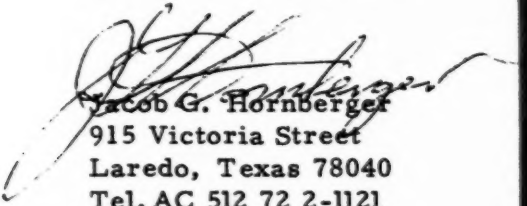
That discrimination and racial prejudice exists in Texas cannot be seriously questioned by any person cognizant of the facts. However, it is unfortunate that some of the appellate courts of this State piously refuse to acknowledge this fact and thereby add to the turmoil that already exists.

Petitioners submit that the fact that they did not have a fair and impartial trial is apparent

from the record. Since the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas and the Supreme Court of Texas refused to grant relief, they now have recourse only to the highest court of this land.

WHEREFORE, petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas.

Respectfully submitted,



Jacob G. Hornberger
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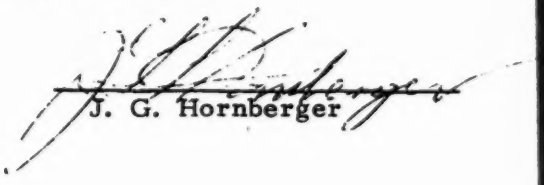
Tel. AC 512 72 2-1121
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 1973, a copy of Petitioners' Petition for a Writ of Certiorari was by me mailed to Cullen, Carsner, Edwards, Williams & Stevenson, P.O. Box 2207, Victoria, Texas, 77901, Attorneys for Joseph Edward Craig, defendant.



J. G. Hornberger

COURT OF CIVIL APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT

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CORPUS CHRISTI, TEXAS

April 12, 1973

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Re: Cause No. 752, Tr.
Cr. #5114
James P. O'Neill, Jr.,
et al v.
Joseph Edward Craig

The judgment of the trial court in the above styled cause was today AFFIRMED.

A copy of the opinion is enclosed.

/s/ Margaret Blackmon

MARGARET M. BLACKMON,

Clerk

MMB/ kc

Enclosure

cc: Hon. Joe E. Keely, District Judge

Hon. D. Lee Schulze, District Clerk,

Goliad County

NUMBER 752

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH SUPREME JUDICIAL

DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

****

JAMES P. O'NEILL, JR., ET AL,

Appellants,

V.

JOSEPH EDWARD CRAIG,

Appellee.

****

On appeal from the 24th District Court of

Goliad County, Texas.

****

OPINION

This is an automobile rear end collision case. The plaintiffs were the owners and passengers in an automobile driven by plaintiff Mrs. Maria V. O'Neill. The defendant's

vehicle ran into the left rear portion of plaintiffs' vehicle, causing damages and personal injuries to the plaintiffs. The case was tried before a jury which exonerated the defendant of liability and which found contributory negligence on the part of the plaintiff Mrs. O'Neill. Mrs. Maria V. O'Neill and her mother, Mrs. Florencia Vidaurri (a passenger) have appealed.

On November 24, 1967, appellant Mrs. O'Neill, was driving her automobile from Houston to Laredo. The other appellant, Mrs. Vidaurri, was riding in the back seat. The car was headed west on U. S. Highway 59 towards Laredo. Highway 59 at this point consists of four driving lanes, two east and two west, and two parking lanes, one each on the extreme north and south side of the highway. Sometime after dark appellant Mrs. O'Neill stopped her automobile on the north or her right hand side

of the highway in the town of Goliad. She stopped in front of a filling station so that one of the occupants of the car could make a phone call. The evidence was mostly contradictory. According to the appellants, Mrs. O'Neill's car was stopped entirely off the traveled portion of the highway in a parking lane with her parking lights on. According to the testimony of the defendant and two other witnesses, not parties to the suit, plaintiff's car was stopped on or partially on the traveled portion of the highway and displayed no lights.

Appellants' first fifteen points of error complain of the jury's answers to special issues involving primary and contributory negligence and proximate cause associated therewith. They argue that the jury's answers are contrary to the greater weight and preponderance of the

evidence. The jury answered all of the contributory negligence issues against plaintiff O'Neill. The only issue as to appellant Vidaurri (the passenger), involving her negligence, was answered in her favor. That issue was whether she remained inside the stopped vehicle under circumstances under which a person of ordinary prudence would not have done so. The primary negligence issues as to the defendant concerning his speed and lookout were answered favorable to the defendant.

The insufficient evidence points require us to read the entire record. The question whether the answers to the jury's verdict are against the great weight and preponderance of the evidence, requires us to consider and weigh all of the evidence in the case and to set aside the verdict and remand the cause for a new trial, if we thus conclude that the

verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. This we must do regardless of whether the record contains some "evidence of probative force" in support of the verdict. The evidence supporting the verdict is to be weighed along with the other evidence in the case, including that which is contrary to the verdict. In re King's Estate, 244 S. W. 2d 660 (Tex. Sup. 1951).

The defendant testified that he entered Highway 59 a block or two east of the O'Neill vehicle. He was travelling west. He testified that he was travelling in the outside or north traveled lane of the highway and that he did not move into the parking lane at any time. His testimony was that his headlights were on low beam and functioning properly. The defendant testified that he was travelling about thirty

miles per hour. On cross-examination he admitted that he might have increased his speed a mile or two or as much as five miles per hour. Although he did not testify positively that he was exceeding thirty miles per hour, he stated that "maybe I was going one to five miles an hour in excess of thirty miles per hour."

The defendant testified unequivocably that he was driving carefully, paying attention and looking down the road but did not see plaintiffs' vehicle. He testified that just before the collision occurred, somebody hollered at him from the service station to his right, where he used to work; that he responded by looking in that direction, and that by the time he returned his gaze to the road ahead, plaintiffs' vehicle was directly in front of him. He testified that he immediately applied his brakes, attempted to turn his vehicle to the left, but the right hand

portion of his vehicle struck the left rear portion of plaintiffs' vehicle. It was undisputed that the plaintiffs-appellants sustained personal injuries and damages. No one testified adversely to the defendant as to the primary acts of negligence and proximate cause.

The case was submitted to the jury on special issues. The jury found that the defendant was not driving his vehicle at a greater rate of speed than a person using ordinary care would have driven; that the defendant did not fail to keep a proper lookout; that there was not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of 500 feet ahead; that the defendant's vehicle was equipped with lower beam headlamps so aimed and of sufficient intensity as to reveal persons and vehicles at least 100 feet ahead upon a straight, level and unlighted

highway under normal atmospheric conditions; that the defendant was not operating his vehicle in a portion of that part of the highway designated as a parking lane; that the plaintiff, Maria V. O'Neill stopped her vehicle on the main traveled part of the highway at a time when it would have appeared practical to a person using ordinary care to stop the vehicle off the main-traveled part of the highway; and that such conduct was a proximate cause of the occurrence in question; that the plaintiff, Maria V. O'Neill, stopped her vehicle on the main-traveled part of the highway without a red light on the vehicle visible from a distance of 500 feet to the rear, and that was a proximate cause of the occurrence in question. The jury awarded zero damages to Mrs. O'Neill, zero damages to Mrs. Vidaurri, and found that the reasonable expenses for necessary

medical and hospital care received by Mrs. O'Neill in the past for tratment for her injuries resulting from the occurrence in question were $146.00 and for Mrs. Vidaurri, $141.00. A take-nothing judgment was entered on the verdict.

The mere occurrence of a rear end collision does not constitute negligence as a matter of law, nor is any particular act of negligence attributable to a driver who drives into the rear of another vehicle as a matter of law. See Dillon v Moore, 367 S. W. 2d 70 (Tex. Civ. App. --Dallas 1963, n. w. h.); Shiflett v. Bennett Printing Co., 330 S. W. 2d 220 (Tex. Civ. App. --Waco 1959, n. w. h.). Specific acts of negligence must be proved and they must have been a proximate cause of the occurrence in question in order for the other party to recover. 65 C. J. S., Negligence, §104,

citing Biggers v. Continental Bus System, 303 S. W. 2d 259 (Tex. Sup. 1957) and Hopson v. Gulf Oil Corp., 237 S. W. 2d 352 (Tex. Sup. 1951). Here the defendant testified that he was keeping a proper lookout. His attention was diverted apparently by the natural reaction to somebody calling out his name. The jury was warranted in finding that there was no negligence on the part of the defendant under the circumstances. Clearly such evidence does not preponderate against the jury verdict so as to cause a reversal. There was no evidence that such diversion was a proximate cause of the collision in question. The same reasoning is apparent from the record as to speed. The jury determined that the defendant was not driving at a greater rate of speed than a person using ordinary care would have driven under the same or similar circumstances. There

was no evidence that the driving of the vehicle at one to five miles an hour faster than the speed limit was the proximate cause of appellant's damages and injuries.

The jury is the sole judge of the facts and the circumstances proven. They may draw reasonable inferences and deductions from the evidence adduced before them. Insofar as there may be conflicts in the testimony of the witnesses, it is clear that the jury in the exercise of its prerogative, dtermines the credibility of the witnesses and the weight to be given their testimony. With all of the applicable principles of law in mind and after balancing the substantial evidence that supports the verdict against such evidence as is against the verdict, we do not find that the great weight and preponderance of the evidence requires a reversal of this case. Gulf, Colorado

& Santa Fe Railway Company v. Deen, 312 S. W. 2d 933 (Tex. Sup. 1958); Couch v. Hale, 404 S. W. 2d 920 (Tex. Civ. App. --Corpus Christi 1966).

Insofar as appellant O'Neill complains of the jury's finding of no damages for pain and suffering, there is no reversible error here in view of the findings by the jury of contributory negligence on her part, which was the proximate cause of the occurrence in question. Southern Pine Lumber Co. v. Andrade, 124 S. W. 2d 334 (Tex. Comm'nApp. 1939); Milburn v. Blum, 302 S. W. 2d 671 (Tex. Civ. App. -- Eastland 1957, n. w. h.). Since the defendant was wzonerated of any negligence which might have been the proximate cause of the occurrence in question, it was also harmless error for the jury to have dtermined that there were no damages for past or future pain and suffering

or loss of earning capacity on behalf of the passenger, appellant Vidaurri. Garza v. San Antonio Transit Co., 180 S. W. 2d 1006 (Tex. Civ. App. --San Antonio 1944, ref'd w. o. m.); Jones v. State Fair of Texas, 127 S. W. 2d 948 (Tex. Civ. App. --Amarillo 1939, dism'd judg. corr.); Bates v. Barclay, 484 S. W. 2d 955 (Tex. Civ. App. --Beaumont 1972, n. r. e.); Robinson v. Crump, 422 S. W. 2d 536 (Tex. Civ. App. --Houston (14th Dist) 1967, n. r. e., 427 S. W. 2d 861).

Appellants' next series of points of error complain of jury misconduct. After the charge of the court had been handed to the jury and the jury had retired, the foreman sent a note to the trial judge which stated:

> "If we set money damages resulting from this occurrence does this mean we are setting blame?"

The trial judge correctly answered the note by responding:

"Members of the Jury: You are to consider the issues concerning damages independently of the other issues"

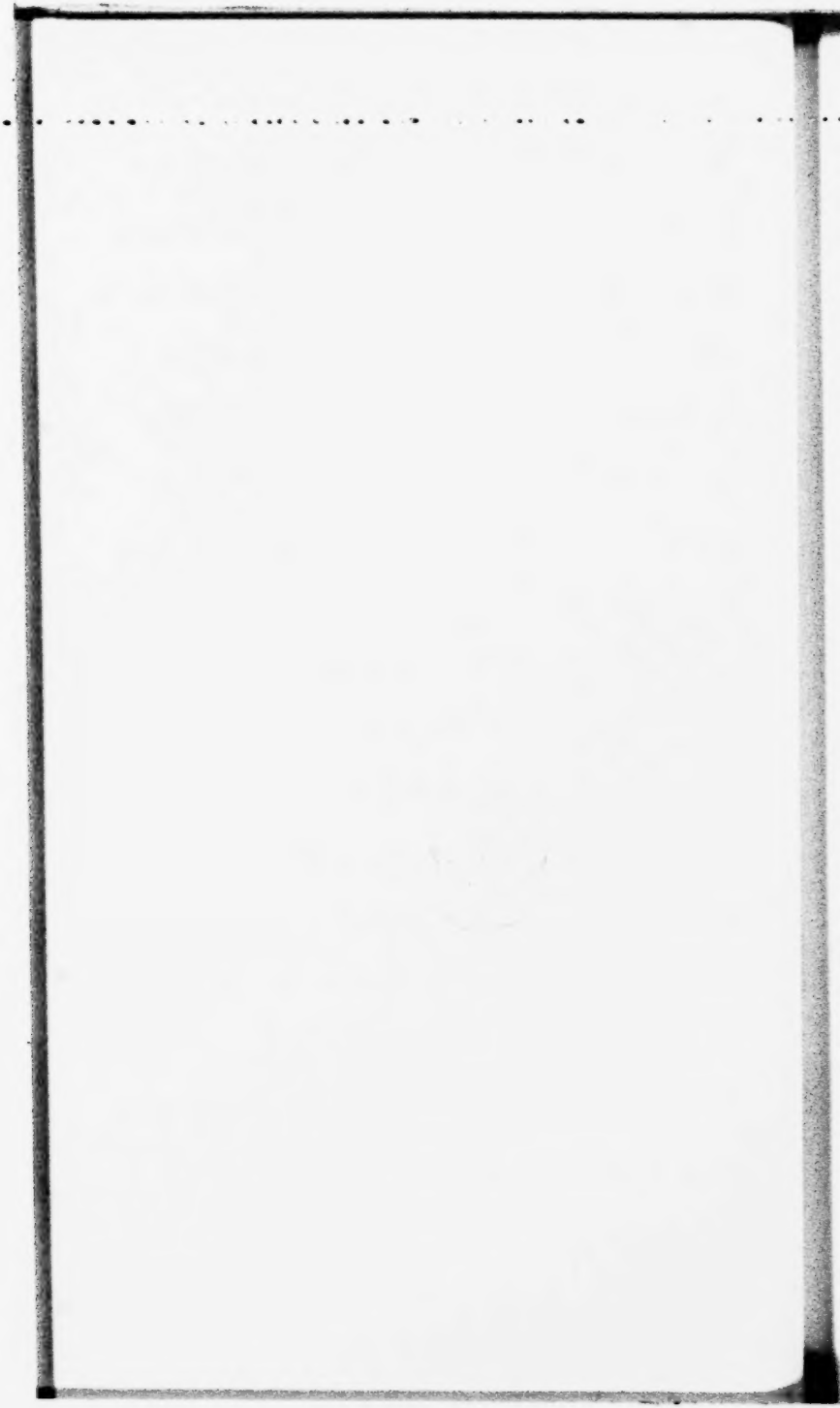
No reversible error is apparent.

The appellants' motion for new trial which complains of jury misconduct, was not sworn to. There were no affidavits attached to the motion and there was no reason stated in the motion for new trial why the affidavits were not attached. The Commission of Appeals in Roy Jones Lumber Co. v. Murphy, 163 S, W. 2d 644, opinion adopted by the Supreme Court, stated:

"The only remedy against "fishing expeditions"where misconduct is charged, is to require that, by affidavits, the movant shall prove his good faith, and, by particulari-

zing, demonstrate that his allegations of misconduct are based upon knowledge and not suspicion or hope. Freedman Packing Co. et al v. Harris, Tex. Civ. App., 160 S. W. 2d 130, 134, error dismissed, want of merit." In absence of the affidavits or a reasonable excuse as to why the affidavits could not be secured, it is a matter within the sound discretion of the trial court to determine if jury misconduct occurred. Roy Jones Lumber Co., supra, at page 646; Allan v. Materials Transportation Company, 372 S. W. 2d 744 (Tex. Civ. App. --Corpus Christi 1963). We have read the record in its entirety and we do not find that the trial court abused its discretion in failing to grant a new trial.

All of appellants' points of error have been considered and they are overruled.



Judgment of the trial court is affirmed.

Opinion delivered and filed this the 12th day of April, 1973.

PAUL W. NYE

Chief Justice

COURT OF CIVIL APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT

COURT OF CIVIL APPEALS BUILDING

POST OFFICE BOX 2390

CORPUS CHRISTI, TEXAS

May 3, 1973

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Victoria, Texas 77901

Re: Cause No. 752

James P. O'Neill, Jr.,
et v.
Joseph Edward Craig

Appellants' motion for rehearing was today

OVERRULED by this Court.

/s/ Margaret Blackmon

MARGARET M. BLACKMON

Clerk

MMB/kc

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

July 25, 1973

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of O 'NEILL ET AL. V. CRAIG, NO. B - 4055 was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON,
Clerk

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

Sept. 25, 1973

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of O'NEILL ET AL. V. CRAIG, NO. B-4055 was this day overruled.

Very truly yours,

GARSON R. JACKSON,

Clerk

NUMBER 752

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH SUPREME JUDICIAL

DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

****

JAMES P. O'NEILL, JR., ET AL,

Appellants,

V.

JOSEPH EDWARD CRAIG,

Appellee.

****

On appeal from the 24th District Court of

Goliad County, Texas.

****

OPINION

The appellants have filed their "Motion to Stay Judgment or Mandate" in the Supreme

Court of the State of Texas. The Clerk of the Texas Supreme Court has forwarded the Motion to this the Thirteenth Court of Civil Appeals where the case was originally decided on appeal. Notice of the Motion was given to the adverse parties.

We accept this Motion which was tendered by the appellants under the provisions of 28 U. S. C. A. Sec. 2101 (f). This article provides for an order staying the mandate, execution and enforcement of the judgment for a reasonable time to enable the parties aggrieved to obtain a Writ of Certiorari from the Supreme Court of the United States. Although the article is primarily designed for a stay order from federal court decisions it does say: "In any case in which the final judgment or decree of <u>any court</u> is subject to review by the Supreme Court on writ of certiorari,

the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court ...." We interpret this provision to permit us to grant the relief requested.

The motion is hereby sustained and a stay is granted on condition that the appellants apply for the writ promptly. If the appellants fail to make application for such writ within the period allotted therefor, or ultimately fail to obtain an order granting the application, or ultimately fail to make their plea good in the Supreme Court of the United States, then this stay will automatically expire on the happening of any of these events without further action on the part of the appellees or upon further action of this Court. Motion conditionally granted.

PER CURIAM

Opinion delivered and

filed this the 18th

day of October, 1973.

NO. 5114

JAMES P. O'NEILL, JR. BY
NEXT FRIEND, ET AL

VS

JOSEPH EDWARD CRAIG

IN THE DISTRICT COURT

OF

GOLIAD COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 13th day of December, 1971, at a regular term of this Court came on to be heard the above styled and numbered cause, wherein James P. O'Neill, Sr., individually and as next friend of his minor children, James P. O'Neill, Jr., Donna Michelle O'Neill and Linda Marie O'Neill, Maria V. O'Neill, Florencia Vidaurri and Juan M. Soliz, individually and as next friend for his

minor daughter, sylvia N. Soliz, are Plaintiffs and Joseph Edward Craig is Defendant, and came the parties and their attorneys of record and announced ready for trial; whereupon the case proceeded to trial with a jury of good and lawful men and women, to-wit: Ada Sue Wells and eleven others, who were duly selected, impaneled and sworn; and before the pleadings of the parties had been read, and before the intorduction of testimony, one of said jurors, to-wit Myrtice Friedrichs, failed to return to Court and counsel for all parties agreed that said juror should be excused and that the trial should continue with the remaining eleven duly impaneled and sworn jurors, counsel for all parties agreeing that they would waive the absence of said onejuror and agreeing to be firmly bound by the verdict of the remaining eleven jorors; and the parties proceeded to pre-

sent their respective evidence on the 16th day of December, 1971, and after the plaintiffs and minor plaintiffs had closed and the Defendant had closed, this Court, on the 17th day of December, 1971, duly charged said jury and submitted to them special issues; and on the 17th day of December, 1971, the jury returned into open court its verdict which was signed by all eleven of the members of the said jury and which was duly received by the Court and filed.

The Special Issues submitted by the Court to the jury are on file with the records of this Court and their answers are as follows: (In the Original Judgment only the answers to the Special Issues are given. For the convenience of the Court I have inserted the Issues together with the answers.)

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the

evidence that on the occasion in question Joseph Edward Craig was driving at a greater rate of speed than a person using ordinary care would have driven?

Answer "We do" or "We do not"

Answer: We do not

If you have answered Issue No. 1 "We do", then answer Issue No. 2 ; otherwise do not answer such following issue.

SPECIAL ISSUE NO. 2

Do you find from a preonderance of the evidence that such action was a proximate cause of the occurrence in question?

Answer "We do" or "We do not."

Answer:_____

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that on the occasion in question

Joseph Edward Craig failed to keep such a lookout as a person using ordinary care would have kept?

Answer "We do" or "We do not."

Answer: We do not

If you have answered Issue No. 3 "We do," then answer Issue No. 4; otherwise do not answer such following issue.

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such failure was a proximate cause of the occurrence in question?

Answer "We do" or "We do not."

Answer: _____

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that at the time of the occurrence in question there was not sufficient light to render clearly discernable persons and vehicles on the

highway at a distance of five hundred feet ahead?

Answer "We do" or "We do not."

Answer: We do

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that on the occasion in question Joseph Edward Craig was operating a vehicle which was not equipped with lower beam head lamps so aimed and of sufficient intensity as to reveal persons and vehicles at least 100 feet ahead upon a straight level, unlighted highway under normal atmospheric conditions?

Answer "We do" or "We do not."

Answer: We do not

If you have answered Issue No. 6 "We do", then answer Issue No. 7 ; otherwise do not answer such following issue.

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the

evidence that such operation was a proximate cause of the occurrence in question?

Answer "We do" or "We do not."

Answer: _____

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that on the occasion in question Joseph Edward Craig was operating his vehicle in a portion of that part of the highway disignated as a parking lane.

Answer "We do" or "We do not."

Answer: We do not

If you have answered Issue No. 8 "We do", then answer Issue No. 9; otherwise do not answer such following issue.

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that such action on the part of Joseph

Edward Craig was negligence?

Answer "We do" or "We do not."

Answer: _____

If you have answred Issue No. 9 "We do" then answer Issue No. 10 ; otherwise do not answer such following issue.

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that such action on the part of Joseph Edward Craig was a proximate cause of the occurrence in question?

Answer "We do" or "We do not!"

Answer: _____

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence the occasion in question Maria V. O'Neill stopped her vehicle on the main-traveled part of the highway?

Answer "We do" or "We do not."

We, the Jury, answer We do.

If you have answered Special Issue No. 11 "We do", then answer Special Issue No. 12; otherwise, do not answer Special Issue No. 12.

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that on the occasion in question Maria V. O'Neill stopped her vehicle on the main-traveled part of the highway, if you have so found, at a time when it would have appeared practical to a person using ordinary care to stop the vehicle off the main-traveled part of the highway?

Answer "We do" or "We do not.".

We, the jury, answer We do.

If you have answered Special Issue No. 12 "We do", then answer Special Issue No. 13; otherwise, do not answer Special Issue

No. 13 .

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that such action was a proximate cause of the occurrence in question?

Answer "We do" or "We do not".

We, the jury, answer We do .

If you have answered Special Issue No. 11 "We do", then answer special Issue No. 14 ; otherwise , do not answer Special Issue No. ~~14~~ .

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that on the occasion in question Maria V. O'Neill stopped her vehicle on the main-traveled part of the highway, if you have so found, without a red light on the vehicle visible from a distance of 500 feet to the rear?

Answer "We do" or "We do not."

We, the jury, answer We do.

If you have answered Special Issue No. 14 "We do" then answer Special Issue No. 15; otherwise, do not answer Special Issue No. 15.

SPECIAL ISSUE NO. 15

Do you find from a preponderance of the evidence that such action was the sole proximate cause of the occurrence in question?

Answer "We do" or "We do not".

We, the Jury, answer We do not.

In this connection you are instructed that "sole proximate cause" means the only proximate cause; and you are further instructed that there can be only one "sole proximate cause" of an event.

If you have answered Special Issue No. 15 "We do not" then answer Special Issue No.

16; otherwise, do not answer Special Issue No. 16 .

SPECIAL ISSUE NO. 16

Do you find from a proponderance of the evidence that such action was a proximate cause of the occurrence in question?

Answer "We do" or "We do not".

We, the Jury, answer We do

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that Florencia Vidaurri remained inside the stopped vehicle under circumstances in which a person of ordinary prudence in the exercise of ordinary care would not have done so?

Answer "We do" or "We do not".

We, the Jury, answer We do not .

If you have answered Special Issue No. 17 "We do", then answer Special Issue No. 18

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that such conduct, if you have so found, was a proximate cause of the injuries to Florencia Vidaurri, if any?

Answer "We do" or "We do not".

We, the Jury, answer _____

SPECIAL ISSUE NO. 19

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Maria P. O'Neill and her husband, James P. O'Neill, for her injuries, if any, which you find from a preponderance of the evidence resulted from the occurrence in question?

You may consider the following elements of damages, if any, and none other:

a. Physical pain and mental anguish which she has suffered in the past.

b. Physical pain and mental anguish which, in reasonable probability she will suffer in the future.

c. Loss of her earnings in the past.

d. Loss of earning capacity which, in reasonable probability, she will sustain in the future.

e. Loss of her household services in the past.

f. Loss of her capacity to perform household services which, in reasonable probability, will be sustained in the future.

Answer in dollars and cents, if any.

Answer: 0

SPECIAL ISSUE NO. 20

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Florencia Vidaurri for her injuries, if any, which you find from a preponderance of the evidence resulted from the occurrence in question?

You may consider the following elements of damage, if any, and none other:

a. Physical pain and mental anguish in the past.

b. Physical pain and mental anguish which, in reasonable probability, she will suffer in the future.

c. Loss of earnings in the past.

d. Loss of earning capacity which, in reasonable probability, she will sustain in the future.

Answer in dollars and cents, if any.

Answer: 0

SPECIAL ISSUE NO. 21

Find from a preponderance of the evidence the reasonable expenses, if any, for necessary medical and hospital care received by Maria P. O'Neill in the past for treatment of her injuries resulting from the occurrence in question.

Answer in dollars and cents, if any.

Answer: $146.00

SPECIAL ISSUE NO. 22

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would be compensation for the reasonable expenses, if any, for necessary medical and hospital care which Florencia Vidaurri, in reasonable probability, require in the future for treatment of her injuries resulting from the

occurrence in question.

Answer in dollars and cents, if any.

Answer: 141.00

SPECIAL ISSUE NO. 23

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would be compensation for the reasonable expenses, if any, for necessary medical and hospital care which Florencia Vidaurri, in reasonable probability, require in the future for treatment of her injuries, resulting from the occurrence in question?

Answer in dollars and cents, if any.

Answer: 0

CERTIFICATE

We, the Jury, have answered the above and foregoing Special Issues as herein indicated, and herewith return same into Court as our verdict.

/s/ John W. Steele, Jr. /s/ Roman Lee Bathke,

/s/ O. G. Berger Jr.

/s/ Joe Jackson /s/ Willie A. McDow

/s/ Sterling Worley /s/ Bert Bammert

/s/ Martin Reyes /s/ Hugh Whitfield

/s/ Leland Bego

/s/ Ada Sue Wells, Forelady

and said verdict of the jury having been received by the Court, and none of the parties having made any further request of the Court with regard to the jury, the Court did thereupon discharge said jury.

And it appearing to the Court that James P. O'Neill, Sr., as next friend and guardian ad litem for his monor children, James P. O'Neill, Jr., Donna Michelle O'Neill and Linda Marie O'Neill, withdrew any claim for their injuries before the same was presented to the jury, and such was not submitted to the jury.

And it further appearing to the Court that from the verdict of the jury, the pleadings and the evidence that should be entered herein decreeing that James P. O'Neill, Sr., as next friend for his minor children, James P. O'Neill Jr., Donna Michelle O'Oneill and Linda Marie O'Neill should take nothing against the Defendant, Joseph Edward Craig.

And it further appearing to the Court that Juan M. Soliz, as next friend and guardian ad litem for his minor daughter, Sylvia N. Soliz, withdrew any claim for her injuries before the same was presented to the jury and such was not submitted to the jury.

And it further appearing to the Court that from the verdict of the jury, the pleadings and the evidence, that judgment should be entered herein decreeing that Juan M. Soliz, as next friend for his minor daughter, Sylvia

N. Soliz, and Sylvia N. Soliz, should take nothing against the Defendant, Joseph Edward Craig.

And it further appearing to the Court from the verdict of the jury, the pleadings and the evidence that judgment herein should be entered decreeing that James P. O'Neill, Sr., Maria V. O'Neill and Florencia Vidaurri take nothing against the Defendant, Joseph Edward Craig.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that James P. O'Neill, Sr., individually and as next friend for James P. O'Neill, Jr., Donna Michelle O'Neill and Linda Marie O'Neill, Juan M. Soliz, individually and as next friend for Sylvia N. Soliz, Maria V. O'Neill, Florencia Vidaurri, James P. O'Neill, Jr., Donna Michelle O'Neill, Linda Marie O'Neill and Sylvia N. Soliz take nothing against

the Defendant, Joseph Edward Craig.

IT is further ORDERED, ADJUDGED and DECREED by the Court that all costs herein incurred by, and they are hereby, assessed against the Plaintiffs, for which costs the officers of this Court may have execution if not timely paid.

To the foregoing actions of the Court in entering judgment, the Plaintiffs, in open Court, duly objected and excepted.

SIGNED AND ORDERED ENTERED on this 18th day of January, A. D., 1972.

/s/ Joe E. Kelly

Judge Presiding

APPROVED AS TO FORM:

J. G. Hornberger
Attorney for Plaintiffs

CULLEN, CARSNER, EDWARDS, WILLIAMS &

STEVENSON

Attorneys for Defendant

By /s/ Clarence N. Stevenson

Of Counsel

TESTIMONY (IN PART) OF THE DEFENDANT, JOSEPH EDWARD CRAIG:

Q You went onto Highway 59. Now, what -- what sort of a highway is Highway 59, Mr. Craig?

A What do you mean, what sort of a highway?

Q Could you give me a description of the type of highway that it is?

A It's two driving lanes on each side and a parking lane.

Q Parking lane on each side?

A Yes, sir.

Q Is there a blinking light or is there a caution light at that intersection?

A There's a caution light.

Q Now, you proceeded -- you took a a left on Highway 59?

A Yes, sir.

Q Do you know -- do you know what beam your headlights were on;

A I had them on low. Low.

Q Did you have a high and low beam on your headlights?

A Yes, I did.

Q What was the status of you --

A I had them on low.

Q You had them on low?

A Yes, sir.

Q And when you entered the -- on Highway 59, which direction were you going?

A I was heading towards Beeville.

Q Oh, would that be a westerly direction?

A Yes, it would.

Q And once you entered into the westbound traffic of Highway 59, which

lane of the westbound traffic did you decide to stay in?

A Took the slow lane on the left -- I mean the right side. The slow lane.

Q That would be the north traffic lane of Highway 59 --

A Right.

Q -- on the western -- going in a westerly direction?

A Right.

Q Now, at the first time you saw the car, the plaintiffs' automobile, it was pointing in a westerly direction, is that right?

A Right.

Q What was the position of the car in regard to any of the lanes of Highway 59, when you first saw it?

A It was about half and half, because the first thing I saw was the license plate.

Q The first thing you saw was the license plate?

A Right.

Q How soon before you first saw the vehicle -- how soon after that did the collision occur?

A Not very long, because I was right on top of the car when I saw it.

Q Well, in other words, where was your car when you first saw the plaintiffs' car?

A I wasn't very far away. I was --

Q Well, I'd like for you to mark it.

A (The witness drew on the diagram)

Q Now, how far were you from the

plaintiffs' vehicle when you first saw it?

A I don't know. I was right on top of it, almost.

Q Would you have any idea or approximation of how many feet?

A Not an honest guess.

Q Now, you were in -- in which -- you continued in the northerly traffic lane, going in a westerly direction?

A Right.

Q Do you have any idea, or can you tell me what your speed was at the time that you first saw the plaintiffs' vehicle?

A Around thirty. Thirty-five, maybe.

Q Thirty to thirty-five?

A Right.

Q Did you check your speedometer?

A I checked it after I got onto my lane. But I thought it was -- If I looked at it, it was at thirty when I pulled -- after I got up into right up in here, well, you know, I glanced at my speedometer from here somewhere, and it said thirty before I got down there, I know. But I might have increased my speed a little bit.

Q All right. You might have increased your speed down here, is that right?

A Well, I mean a mile or two. Three, four, maybe.

Q Uh-huh. So at this point, you possibly were doing, say, thirty-four?

A Maybe thirty-three.

Q Thirty-three, thirty-four, maybe even thirty-five?

A Maybe.

Q Now, are you familiar with any of the -- were you familiar at that time with any of the employees of this Texaco Station?

A I don't know, because I couldn't t ell you who worked there any more.

Q No. I am not talking about now.

A Well, at the time of the wreck, I don't know who worked there.

Q Uh-huh. Were -- did you know -- did you know anybody at this Mobil Station?

A Yes, I did.

Q Who did you know that worked there?

A Well, it was Bobby Staley, Delmer Loest.

Q You knew most of the employees?

A I knew just about everbody that worked there.

Q Now, in your deposition, you stated that just prior to the collision that -- I will read it to you, to refresh your memory.

On page 5 of your deposition, I'd like for you to -- to please read for me the portion on line 7 of page 5 of your oral deposition, and read that testimony to the jury, please.

A Just the answer?

Q Well, ask the question first, and then the answer.

A Okay. "Can you tell me just about the --" Wait a minute.

"Can you tell me just about how the accident happened, if you

recall it?"

Answer: "Well, I was driving along and looked and looked and looking--" Pardon me. "looked -- ". Wait. "Well, I was driving along and looked and looked, and I was looking, and I drove by the station. I thought somebody hollered. I didn't pay much attention to it and I kept driving. And then I looked, I saw this car in front of me. I tried to swerve and stop and I couldn't."

Q Now, you stated that you thought somebody hollered at you?

A Yes, sir.

Q Can you tell me who you thought had hollered at you?

A I thought it come from the Mobile Station.

Q You thought it came from the Mobil Station, Did you know who was on duty at the Mobil Station at that time?

A No, I did not.

Q Did you notice who hollered at you?

A No, I did not, I looked towards the Mobil Station but everybody was working, so I just looked back, put my eyes back on the road, and started, you know, went down the highway.

Q About where were you, Joe, when you heard the call or the holler?

A Well, I'd say if -- I had probably just passed. I was about in halfway, well, right in front of the Mobil Station.

Q And that will identify the position of the car when you heard someone

hollering at you, is that right?

A Right.

Q At that time, you glanced to the station, is that right?

A Right.

Q To see who it was, it that right?

A Right.

Q And then you turned back, would that be right?

A Yes, sir.

Q Now, where did you strike the vehicle of -- of the plaintiffs?

A The left rear fender.

Q The left rear fender?

A Right.

Q Now, you mentioned before that the first thing you saw was the -- if I am not mistaken, was the licens plate, is that right?

A Right.

Q Why, particularly, did the license plate catch your attention first?

A Because it was shining. The reflection of my lights were hitting on them, and that was the first thing I saw shine.

Q So, now, where did the -- which headlight would that be?

A My headlights, both of mine, probably.

Q Both of your headlights on her -- on the plaintiffs' license plate, would that be right?

A Well, I don't know. Both of them, maybe one. I don't know.

Q Which one? If it were one, which one would it be?

A I'm not that good of a mechanic.

I can't say.

Q Your right front fender. And approximately where didyour right front fender strike her vehicle?

A The left rear fender.

Q Did you, before you colli ded with the plaintiffs' vehicle, did you leave any skid marks? Did you hit your brakes?

A Yes, I did, I hit my brakes and tried to swerve.

Q Did you swerve?

A I f I did, it was very little.

Q Well, now, it is very important that -- that we know if you were able to swerve at all, or whether it was just impossible for you to swerve.

A By the time I hit my brakes and swerved there was the collision.

Q Did you bear your wheel, in which direction, right or left?

A As far as I could turn it.

Q Which direction?

A To the left. It was as far as I could grip it. When I stomped on my brakes, I turned at the same time.

Q Did you turn at all?

A I don't know if I did or not.

Q Now, would it be a fair statement that if you were proceeding in this traffic lane all the time, and you ran into the plaintiff here, that you did not swerve, would that be?

A Well, I don't know if I did or not.

Q Do you have any idea how many --

feet of skid marks were left?

A No, I don't.

Q Is the Mobil Station a lighted area?

A Yes, it is.

Q You are familiar with that side of Highway 59, are you not?

A Yes, I am.

Q And you-- you had passed by that station and the Texaco Station numerous times?

A I used to work at that station.

Q You used to work for the Mobil Station?

A Right.

Q Do they have lights at the Mobil Station?

A Yes, they do.

Q I mean florescent-type lights, overhead lights?

A In the driveway, they do.

Q Do they -- do they -- what type of lights are they, in other words, the bulb-type lights, or the --

A Long florescents.

Q Long florescents?

A Right.

Q Do they have any outside lights?

A They have got a couple that stay up by the -- well, one for the wash rack, one of them by -- the other ones, I don't know where the rest are.

Q Were the lights on? Was that Texaco Station open, to your knowledge, on the night of the accident?

A I think it was. I am not for certain.

Q Was the Mobil Stationopen on the night of the accident?

A Yes, it was.

Q Were the lights on the Mobil Station on, on the night of the accident?

A For the driveway, they were on.

Q But would you consider this entire filling station an illuminated, well-lighted filling station?

A Yes, it is.

Q At nighttime. Say after you once get into this lane and you are not looking straight ahead, how far can you see?

A It depends on the weather.

Q Well, say it's a night -- a clear night. In other words, it's not -- say it was not foggy.

A I wouldn't --

Q Was it foggy?

A No, it was not.

Q Was the visibility good?

A Yes, it was.

Q All right. Well, take a circumstance similar to that, say, on a night that the weather conditions were favorable, where the visibility was good, could you see the local filling station from, say, immediately after you turned onto Highway 59?

A I guess you could if I wouldn't -- I guess you could, if you paid attention to it.

Q What would you be paying attiention -- what were you paying attention to, on the night of the accident?

A I was going to go to Dairy Cup, that's --

Q I mean, which direction was the

Dairy Cup?

A The Dairy Cup is on down west of our station.

Q Is that in the general direction of the Mobil Filling Station?

A Right. It's down further. It's two or three, four blocks down, I think.

Q So if you were looking -- if you were going to the Mobil Filling Station, you were looking in a westerly direction down Highway 59, were you not?

A Right.

Q Now, how far down Highway 59 could you see?

A In feet, I couldn't give you an honest answer.

Q Well, just say blocks.

A Maybe half a block, a block.

Q You mean you could only see a half a block down Highway 59 from when you turned on --

A I wasn't paying that much attention to it.

Q Right. Once you got here, going in this westerly direction, how far down Highway 59 could you see?

A Approximately, in feet, I couldn't --

Q No, I don't -- just say blocks, half blocks, three-quarters of a block?

A About a half a block, three-quarters of a block. Maybe a block.

Q So to your knowledge, the only thing that you remember after getting in this lane, was that you saw some lights over here?

A From the station, yes.

Q From the station?

A Yes.

Q You observed no other objects --

A No.

Q -- or structures, or lights, or anything else?

A No.

Q Do you have good vision?

A Yes, I do.

Q Now, the distance, would you -- would you approximate the distance between where you were and, say, this intersection, approximately a hundred and sixty feet, in other words more or less half of the distance of a block, would that be right?

A Right.

Q Now, your testimony is that at this

point you could see a little more, approximately a hundred and eighty feet?

A Somewhere. Maybe I could have, if I'd of paid more attention.

Q But you weren't paying attention, so that was about the distance that you could see, is that right?

A Right.

Q Do you have any idea how far your headlights illuminate in advance of you?

A No, I do not.

Q But it is your testimony that this is about as far as you would observe, about a hundred and eighty --

A Right.

Q Can you tell me how far that car was from the curb before the collisio

A No, I cannot.

TESTIMONY OF DR. M. E. MALAKOFF INSOFAR AT IT PERTAINS TO THE INJURIES OF THE PETITIONERS:

Q What was the first occasion that you had to examine Mrs. O'Neill, first, Doctor, the -- one of the plaintiffs in this cause?

A November the 27th, 1967.

Q At that time, did you take a medical history of Mrs. O'Neill?

A Yes, sir.

Q And did you conduct an examination of Mrs. O'Neill at that time, Doctor?

A Yes, sir.

Q And were your findings as a result of that examination positive or negative, Doctor?

A Positive.

Q What were those findings, Doctor, as to Mrs. O'Neill?

A My findings at that time, that she had a fracture of the rib, tenth rib on the left side, and a whiplash injury.

Q Did you conduct any tests and -- motion tests or bending tests or any -- any unusual tests, Doctor?

A Other than in my office, with flexion, extension, rotation -- excuse me -- bending the head forward, backward, trying to rotate the head on the trunk. And compressing her chest, seeing whether she had difficulty in respiration. Of course, the usual physical examination most doctors do, sound listening,

and so forth.

Q Would you consider these diagnostic tests, Doctor?

A Presumptively, yes.

Q Did you perform any other tests on Mrs. O'Neill?

A I had an x-ray taken of her chest and her cervical spine, her neck.

Q Where did you have the X-ray taken, Doctor?

A Mercy Hospital at Laredo, Texas.

Q What date was this?

A The 20 -- well, we ordered it on the 27th. She took it on the 28th of November, 1967.

Q Now, did you have a chance to examine the X-rays shortly thereafter, Doctor?

A I looked at them and I had a radio-

logist review them, too.

Q Who would that radiologist be?

A Dr. Albert C. King.

Q And he is a practicing radiologist in Laredo, is that right?

A Yes, sir.

Q Has he been practicing there for many years?

A I don't know exactly. I guess in the vicinity of twenty-five to thirty years.

Q And you have used him frequently?

A Constantly.

Q Now, Doctor, based on your medical history that you took of Mrs. O'Neill, at the time she came in, around, I think you said, November 27th, --

A Yes, sir.

Q -- around November the 27th, 1967 and your examination of Mrs. O'Neill, the X-rays and other tests, and based

upon your reasonable medical certainty, did you arrive at an opinion as to whether Mrs. O'Neill had suffered any injuries?

A Yes. I -- I felt that she had suffered a whiplash injury and a fracture of her left tenth rib and a -- do you want me to say at the time of the injury, or -- or at my last visit.

Q We will get --

A I don't understand.

Q At the time.

A At the time of the injury?

Q At the time of the injury.

A This was my diagnosis at this time.

Q That was your diagnosis now. Would you explain to the jury

what -- in layman terms, if you could -- what is involved anatomically, I guess, about -- in a whiplash injury and in the injury to the rib?

A Well, as far as the rib is concerned, this is just a break. An ordinary fracture of the rib just means a break in the rib. When you say axillary line, that means in the line down from the armpit. The armpit is called the axilla and, everytime the patient takes a breath, unfortunately, she has to move the broken ends of the bone. When she does that, the bone gives her pain. And when she has pain, she tries to stop moving it, so she limits her

respiration; of course, it hurts to take a deep breath.

And whiplash injury is a -- name tacked on, applied to a number of symptoms connected with an accident in which, usually, the victims or the patients are seated in either a very slowly moving vehicle, or a vehicle that is stopped and struck from the rear, and which they are not expecting. And the head is snapped on -- on the neck. And when that happens, there is hemmorhage in the muscles. The ligaments -- I don't know -- let me try to explain.

This is just the -- the connection that -- the hard, white

fibrous connection between bone and bone, or bone and joint. The ligaments are overstretched. The covering of the ligaments develop hemorrahage in them. The nerves that supply the muscles surrounding these organs in this anatomy are overstretched at times.

Then, when the muscles develop hemorrhage in them, they get a little swollen and be irritated. When they do, any muscle that is overstretched or is injured, or develops hemmorrhage between its muscle fibers, develops -- becomes tense and -- and we could say he develops a muscle spasm. And it's all right to have muscle spasm for a few minutes, because -- but -- but when one develops

it without being able to relax the muscle, the muscle becomes extremely painful. The patient then begins to hold their head tense. Of course, they are afraid to move it, afraid to move these organs that supply motion.

When I say rotation, I mean turning, or flexion, which means bending it forward or extending it. The patient walks fairly stiff-necked and stiff-headed, tries to turn their trunk to s because of the pain.

And the -- usually people like this in most instances, don't lose the symptoms for long periods of time, although nothing -- usually there's no fracture, no break in

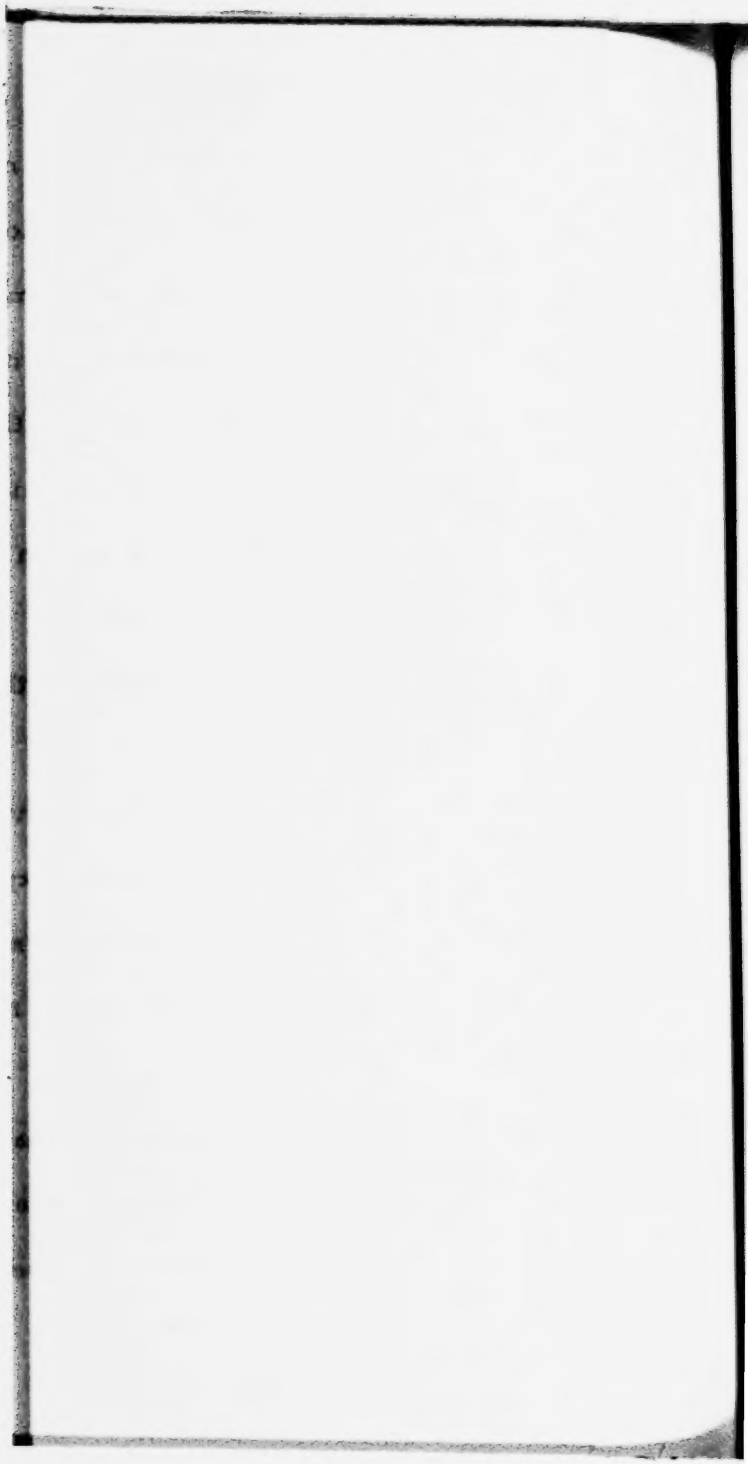
the -- in the vertebra, no break in the bone, and no dislocation. The only thing, sometimes you can see some straightening of the normal appearing curve of the neck, even in the bones of the neck in the X-ray due to the muscle spasm which pulls them straight.

I -- I hope that this is sufficient, sir.

Q Doctor, now, given -- given the diagnosis that you just explained to the jury -- and did Mrs. O'Neill subsequently visit you in regard to these injuries?

A Yes, on several occasions.

Q Did you treat her for either one of the above injuries subsequent to that occasion?

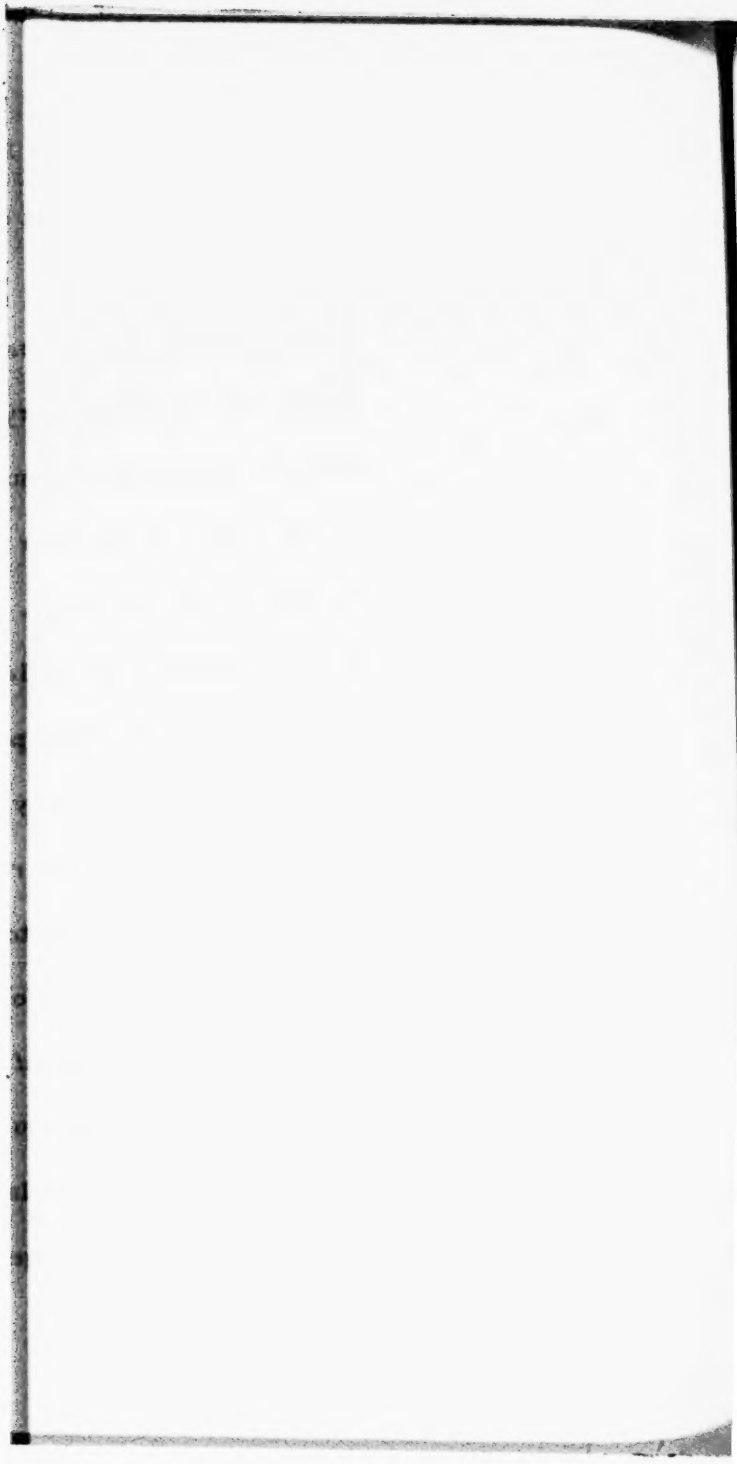


A Yes. Until she -- she left my care.

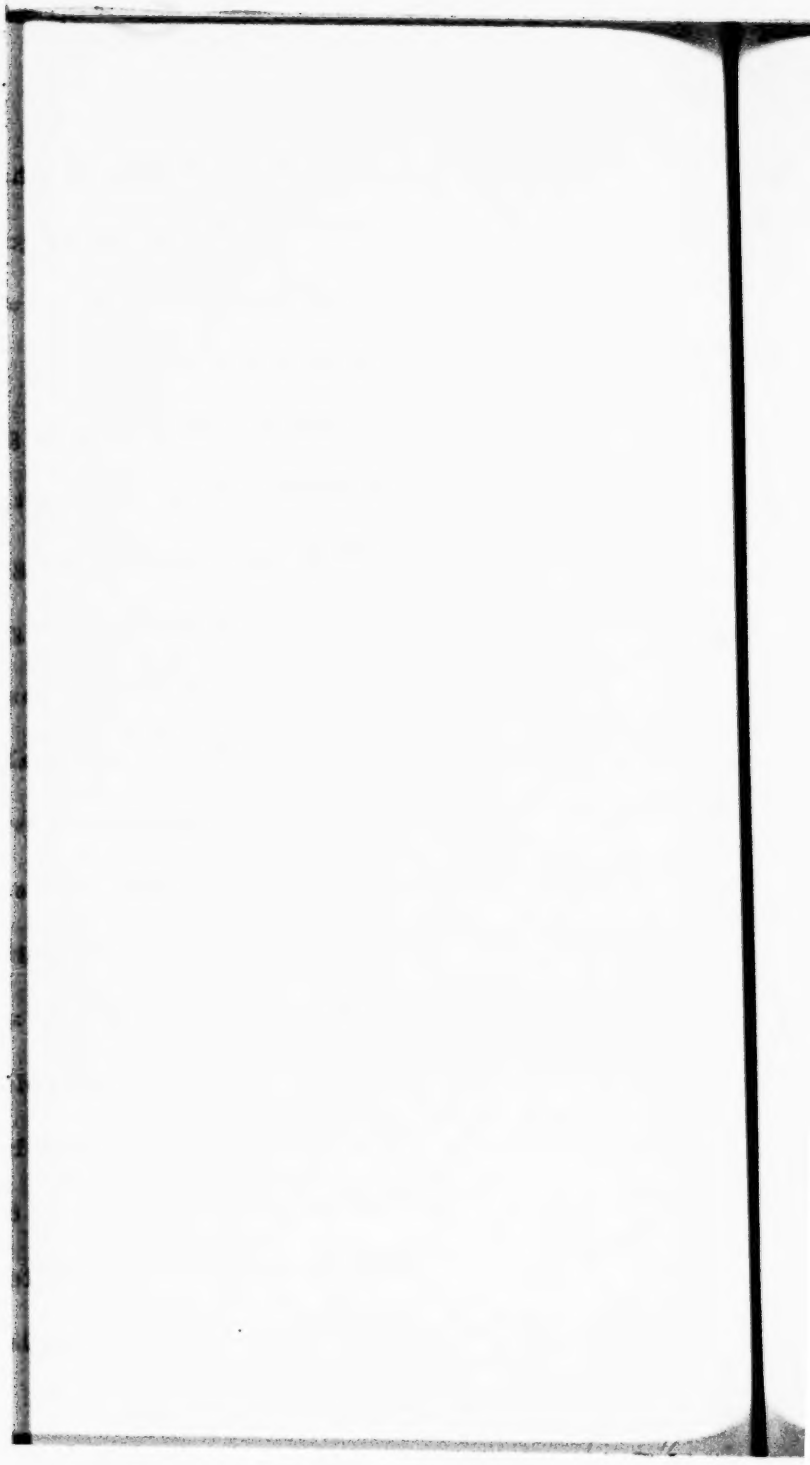
Q What type of treatment did you prescribe for her?

A Muscle relaxants. These are drugs which -- which try to overcome the spasm of the muscles so that when the muscle is more relaxes, it doesn't hurt. And we gave her substances called analgesics -- you call them pain killers -- for temporary relief, so that the patient could rest.

Q Now Doctor, I am going to ask you for a prognosis. But before we do that, I am wondering if for the benefit of the jury that you would give them sort of a brief layman's explanation of what a prognosis is?



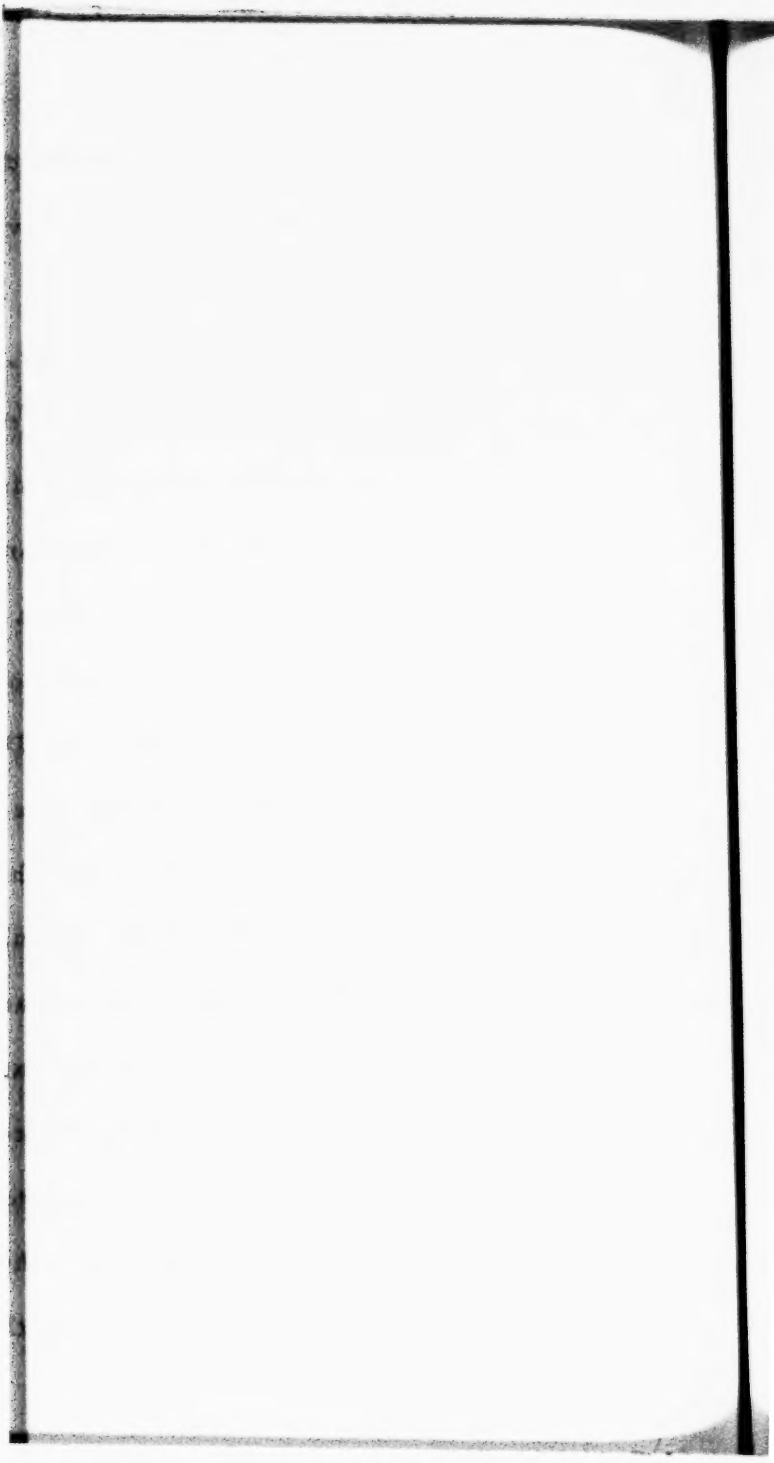
A This is an estimate of what -- whether the outcome is going to become favorable, or we are never going to get a good result, or whether the patient is going to expire, or we won't get any result, the patient is not going to live. You give them a good prognosis or a bad prognosis, or a prognosis for eventual recovery or immediate recovery. It's just a word that, as I say, an estimate of whether the patient's going to get better or not, and about how soon they are going to get better. And how much better they are going to get. Are they going to get completely better, or will there be something left



over from -- from the disease or injury which they have sustained.

Q All right. Now, Doctor, having examined Mrs. O'Neill on various occasions and again, going back to her medical history and her diagnosis, do you have a prognosis on Mrs. O'Neill, based on reasonable medical certainty, Doctor?

A My prognosis is that Mrs. O'Neill as I stated previously, she would have -- have some residual pain from her injury for at least a year. She had a complicating factor of developing an intercostal neuritis. This is a symptom of having -- that affects -- the nerve carried along underneath the in-



jured, and the transmission of sensation is now abnormal, and so that she has -- she still, the last time I saw her, even, complained of pain on breathing. And on motion, she complains of pain in the ribs on -- on the left, when taking deep breaths. That was the 24th -- let me see, pardon me -- the 26th of November, '71.

So on the 26th of November, 1971, why, it was longer than my statement that I had written in my immediate prognosis.

Q So your immediate prognosis --

A Gave her a year.

Q For a year. And now is it your testimony that residual effects are still there and this is--

A Yes.

Q -- through the date of last examination, which was November of 1971?

A Yes, sir.

Q Doctor, can you again supplement your

prognosis from, say, November of '71, as to the outlook for her future?

A I would say she wouldn't have disabling injury, but she would have -- very well have annoying and painful injury over an extended period of time. And I am -- really would not feel qualified to tell you how long that would be, but it would be a matter of months or possibly longer, every time she took a good hard breath, or twisted her trunk, or tried to lift something requiring trunk movement.

Q Now, Doctor, back to November of 196 did you have an occasion to examine Mrs. Vidaurri?

A I did.

Q A Mrs. Florencia Vidaurri?

A I did.

Q Was that on or about November the 27t 1967?

A It was.

Q Did you take a medical history, again Dr. Malakoff, of Mrs. Vidaurri?

A I did.

Q And did you conduct examination -- tests and physical examinations of Mrs. Vidaurri at that time?

A I did.

Q And what were those examinations, Doctor?

A Well, we also took X-rays of her skull, chest X-rays, physical examination, urine examination, and sent her for -- we sent her for, in addition to that, for some blood chemistry because of her history.

Q So there were numerous physical examinations conducted on Mrs. Vidaurri--

A Yes, sir.

Q -- on that occasion?

Were the findings positive or negative, Doctor, on Mrs. Vidaurri?

A She -- she had a positive diagnosis of several things.

Q Did you conduct any diagnostic test on her, Doctor?

A Yes, We had X-rays taken. At that time, the X-rays were non -- well, you ask the question.

Q Did you take any other examinations, other than--

A Urine and blood.

Q Any sort of bending or reflex examinations?

A We always do that.

Q That is, as was the case in Mrs. O'Neill?

A Yes.

Q Were these X-rays taken in Laredo, Doctor?

A Yes.

Q What date were they taken?

A They were ordered on the 27th of November, 1967.

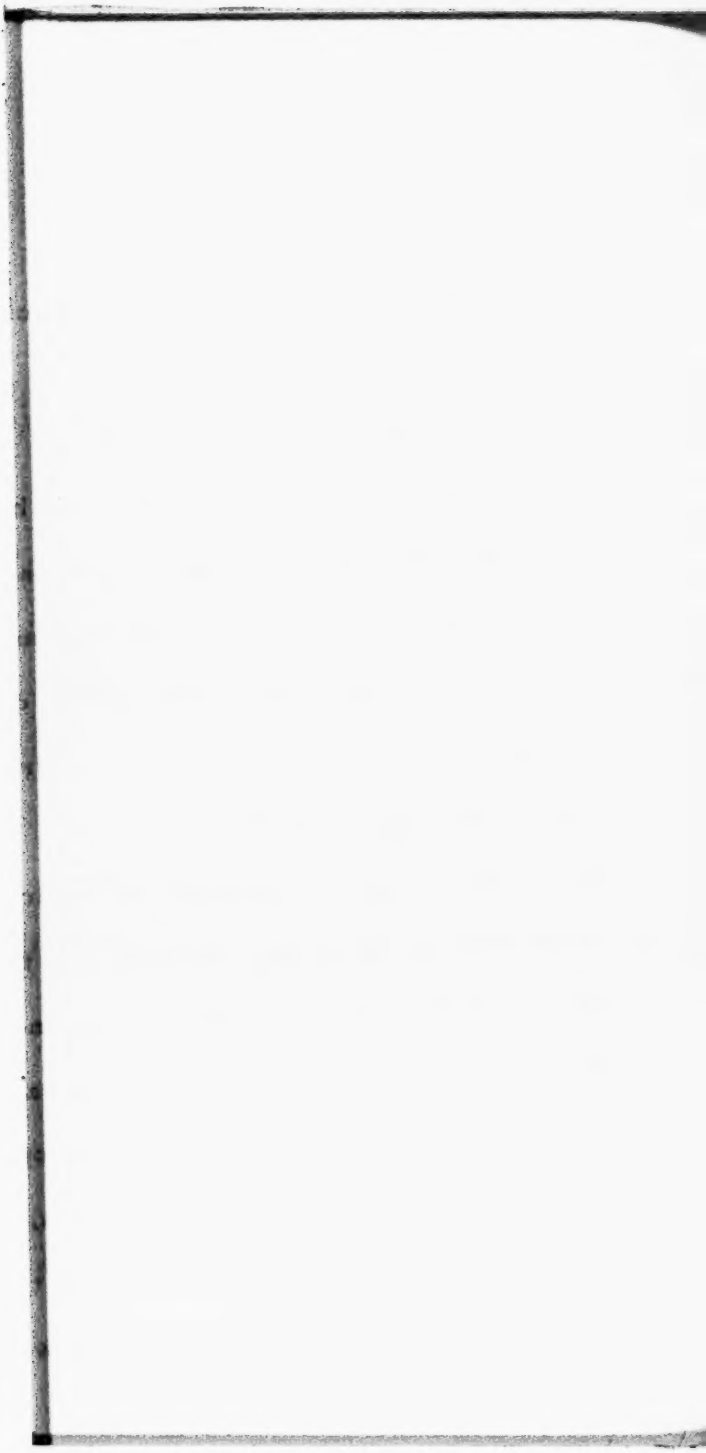
Q And did Dr. King again take --

A May I consult my records? He has an associate and I am -- sometimes one reads them, and sometimes the other. I don't remember.

I would infer that either he or a doctor -- someone associated with him. Or Dr. Manuel Garcia saw the X-rays.

Q Now, Doctor, based on the medical history and on the -- that you took, and the physical and diagnostic examinations, including X-rays, and further based on the medical reasonable certainty, did you arrive at an opinion as to whether the -- one of the plaintiffs, Mrs. Vidaurri, sustained any injuries at that time?

A Well, Mrs. Vidaurri's injuries were



complicated by an underlying metabolic -- an underlying disease that she had had over a long period of time. She is a severe diabetic and as most lay people who are not physicians know, that any infection or injury that's added to -- added to any diabetic, increases not only -- not only gives the -- makes the disease harder to treat, it makes the diabetes worse. And they -- they get a flareup and they are harder to control.

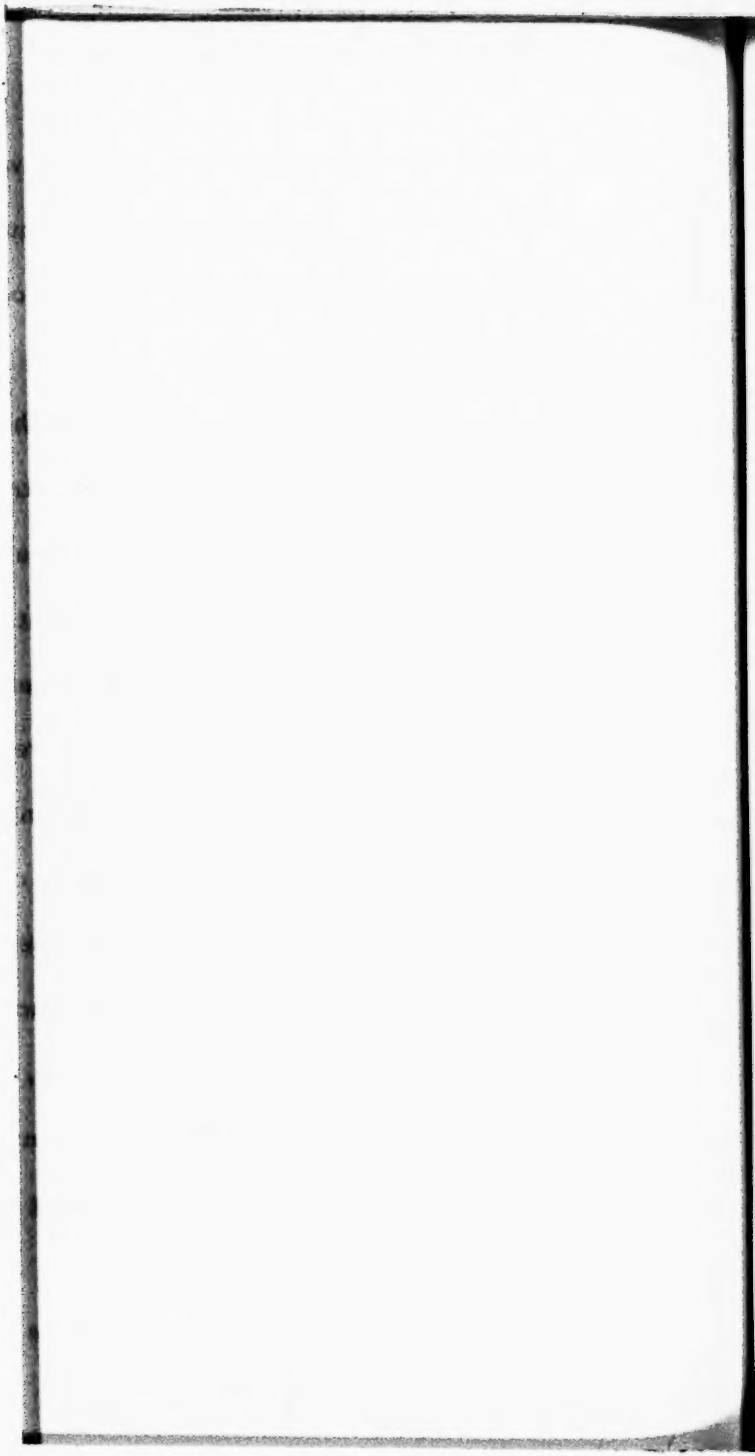
And this -- such was the case here. I diagnosed her as a -- she, when I saw her, she had the -- still had the headache that was the residuals of amild cerebral concussion, although she had no -- no paralysis or weakness at this time, other than from her diabetes. She still had some muscle spasm resulting from her whiplash injury. And, of course, she had a blood sugar of past two hundred. And was

pouring sugar into her urine. It was what you call four plus. It was just about as much as could detect in a super-- in a cruder office test at the time.

Q Doctor, I want to get back to the diabetes condition. But, first, what do you attribute the concussion and the -- your diagnosis of whiplash to, what do you attribute that to?

A Well, her history of an accident. And the fact that she had muscle spasm, very easily could be palpated. When I mean palpate, you can touch it and feel the hardness of the muscle. And that she could -- and when I -- there were tender points along both shoulder muscles and neck muscles in the back, posteriorly, and I could aggravate them by making her bend her head forward, by bending her head backward, or rotating.

Q Now, Doctor, could you give us some



idea, at the time that she visited you and the time that you made that diagnosis, were you able to tell just approximately when she sustained those injuries?

A Recently, I would say.

Q Had it been or or around -- within a short time of when she visited with you, say a few days?

A I would -- I would estimate it as such. I can't be absolutely sure, but this would be -- and also, I might tell you that we always take a history first and my judgment would be influenced by -- by what she had told me of, by the history.

Q All right. Now, those -- those were -- would you classify the -- the source of the conditions, as far as contusion and the -- what you diagnosed as whiplash, and also in Mrs. O'Neill's case, the rib condition, and

the whiplash, would you -- would you attribute that to some sort of trauma, Doctor?

A Yes.

Q Would that trauma be the result of a severe blow to a metal part or a solid part, possibly a vehicle?

A This type if injury, as I already -- as I explained, usually occurrs in people who are sitting the seat of -- of -- in any seat, and either the chair or the vehicle is suddenly struck, suddenly struck from behind, that caused their head to whip on their shoulders.

Q Now, Doctor, I want to go back --

A I guess everbody's seen pictures of these in these dummies where they show them in movies, in television now, in these auto safety tests.

Q Doctor, I want to go back to the diabetes condition. Now, your testimony was that she

was suffering from diabetes at the time, on or about the date that she came to visit you, and before that time?

A Many years before, by history.

Q Now --

A I didn't know it, but that was her story.

Q Now, did she subsequently visit you after that visit of November the 27th, 1967?

A Many times. Many visits.

Q Now, what was the condition of her diabetes after November the 27th, 1967?

A Worse.

Q It was worse?

A As far as -- when I initially started to treat her, she didn't use as much diabetes for a long time -- as much insulin, excuse me, insulin, which is the drug used to try to control her diabetes. She used more later than she used initially.

Q Now, do you follow from her medical history that before the accident she did have diabetes?

A From her history?

Q From her history.

A Yes, sir.

Q But as from your examination of her afterwards, you determined -- could determine that she -- the symptoms of the diabetes were-- had increased in severity --

A Yes, sir.

Q -- would that be your testimony?

Now, Doctor, from -- from her medical history and from your physical examination of her and from subsequent conferences and examinations of her, and based on reasonable medical certainty, can you give an opinion as to whether that diabetes condition was aggra vated after November the 11th -- November of

1967?

A Yes, sir.

Q And based on what you know, and your examinations and medical -- reasonable medical certainty, can you give us what that opinion is, as to what the aggravation was and --

A Well --

Q -- how -- how it came about?

A Well, as you know, there is no -- the treatment of diabetes is a matter not only of medication but of diet, dietary control of the diet, in taking a fairly rigid diet. And, naturally, she's a more elderly person, who has had a lot of anxiety, depression, upset emotionally over the accident, and pain. And, diabetics as a rule have a hard time holding to the diet, because it is a long time thing and it becomes quite burdensome.

Anyway, in her case, with her anxiety and depression, it was very difficult for her to

maintain a diet. As a matter of fact, she didn't. She exceeded her diet, her caloric intake. As a result, her diabetes was -- required more medication and was more difficult to control.

And I have a long record of numerous office visits and desperate attempts to control her diabetes, and the gradually increasing amount of insulin, first, we -- in oral medications --

Q What? Doctor, you said increase in the number of visits. Was that after November of 1967?

A Well, in the beginning, usually, with -- injuries like this, I don't see the patients every day unless I feel that there are--

Q Right.

Q -- that there's something that could be life threatening. And everybody knows, besides physicians, that diabetes can be complicated

enough when the blood sugar is high enough, when the diabetes gets out of control, the patients go -- can go into a coma and expire. So that we require more constant and frequent attention to make sure we don't allow them to lapse into a state in which their diabetes is completely out of control and their life is threatened.

Q Doctor, do you in any way attribute the increase in the dosage of insulin to a trauma or the residual effects of a trauma your patient, Mrs. Vidaurri, may have sustained?

A As I say, Mrs. Vidaurri, in my opinion, was emotionally upset, became anxious, developed a depression. She didn't get over her symptoms as fast as she thought she should like to get over them, and became alarmed and depressed and anxious and tense. And then, when she did that, she didn't stay on her diet. The

usual case with -- with people, with many people who have anxiety and depression and diet, run to the ice box as the baby goes for the pacifier, to relieve their anxiety. And when they do that, of course, they increase their blood sugar and then sugar into the urine. This was the way I estimated that the sequence of events went, as we were -- when we started to use more insulin to control her diabetes.

Q Now, Doctor, you said sequence of events. Would that -- is it your opinion that you could trace the steps, or what we call the causal connection between the trauma and the aggravation of the diabetes condition?

A This was my -- my opinion at the time.

Q So that the diabetes condition was aggravated, in your opinion, as a result of the trauma?

A Yes, intermediately, through the effect of increasing her anxiety depression, her -- her

more frequent trips for -- for diet outside of her dietary restrictions.

Q Would this be a trauma that -- that occurred on or aound the time that she first -- that she came in, in November?

A This is as far as I know. Of course, as I say, this is her first visit, November the 27th. That's the first time I saw her. At that time, she was fifty-nine, incidentally.

Q Now, Doctor, again, we are going back to this business of prognosis, which you explained to the jury. Now, do you -- as a result of examinations and your diagnosis, do you have a prognosis as to Mrs. Vidaurri's condition?

A Oh, I think that eventually, I couldn't say a matter of months or whatever it is, she will gradually improve. I think that as her pain decreases, she becomes more reassured with the passage of months, and maybe longer than

months, as she gradually gets a little more relief and is not so alarmed and she will do better. I think that-- she will never get -- her diabetes will never go away, as I am sure that you all know, that is a lifetime disease. One can control diabetes. One never can cure it.

Q This accident occurred in 1967, so that your initial diagnosis was possibly four years back, a little less than four years back now?

A Yes.

Q Now at that time, did you make a prognosis, Doctor?

A I am trying to look at some of my correspondence. I -- I estimated that in approximately in one year she should be over the effects of her -- of her accident, at that time.

Q What is your prognosis at this time, Doctor? Is she over her condition?

Q -- do you attribute that in any way to, or can you trace the causal connection back to possibly a trauma, would that be your opinion?

A I wouldn't like to give a positive opinion about high blood pressure. There are ten thousand -- there are three theories for every doctor in the world.

My own personal opinion is that when one leads a life of stress and anxiety one tends to develop hypertension. If you lead a life in which you can face each problem with more equanimity, with a more quiet way and not let it -- and forget about it the next day and not dwell on it, you are not going to -- you are going to lead a life in which your chances of having a complication such as high blood pressure are much less.

This is after practicing medicine for almost forty years, and thousands of patients.

A Her last visit, the twelve -- the 7th of December, 1971, she is using approximately three times the amount of insulin she used at the time of my initial visit -- the second time I saw her. She is still using a tranquilizer and she still has ansiety and depression. Her blood pressure is elevated, too, now, when it wasn't at that time.

Q The blood pressure.

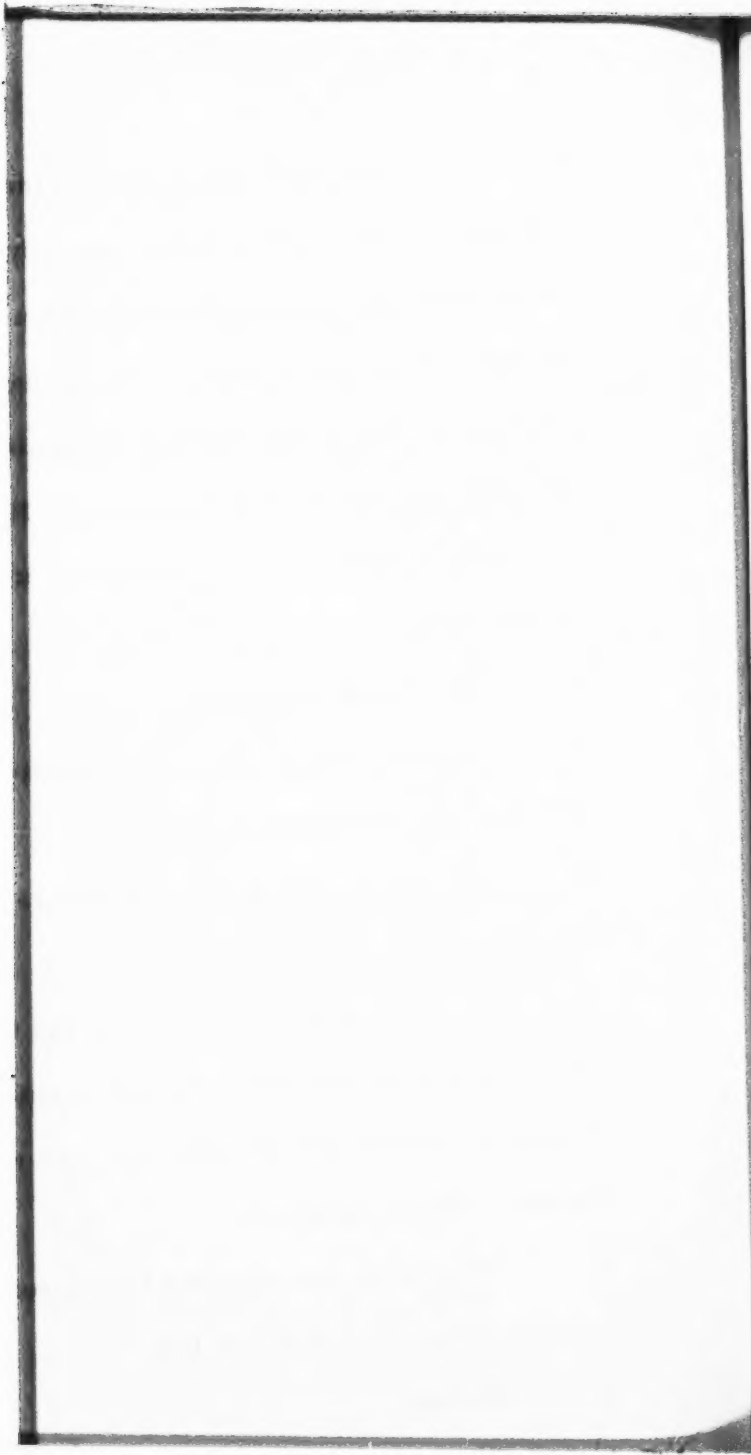
A Is now. She is now a hypertensive. She now has high blood pressure.

Q Did she have high blood pressure when she first --

A On her initial visit to me, in the few days after her alleged accident, she had normal blood pressure. On her initial visit, she was a high normal. She no longer is.

Q Doctor, do you attribute the increase, or the hypertension, I think, is that --

A Uh-huh.



Q Well, Doctor, could you -- would it be probable that there is a causal connection between the two?

A In my opinion, yes. But as I say, this is Malakoff's opinion. This isn't a -- and it is pretty well accepted by many physicians But, as I say, it is very difficult to pin this down. There 's recent evidence that came out of the Veteran's Administration with -- observations over the last twenty-five years, that tends to confirm this, but are not absolute yet. These are studies of World War II. Veterans.

Q Doctor, could you give the jury some idea of what restrictions Mrs. Vidaurri has been laboring under since her initial visit, and then after that, could you give us some idea of what restrictions or handicaps she will be laboring under from this day forward?

A Well, she will always have to have a restricting diet, as far as her diabetes is concerned, and quite restricted. As a matter of fact, I --try to keep her at approximately a thousand to twelve hundred calories a day at the present time. And restrict all salt in her diet, and try to get her to use salt substitute. And, as I say, this for anyone who's ever been on a diet, and try to get her to use salt subtitutes. And, as I say, this for anyone who's ever been on a diet over a long period of time, it gets pretty old and pretty monotonous, and pretty difficult, especially if you live in an atmosphere where there area lot of things you like to eat and taste around you. And she naturally, like I say, she has pain almost constantly when she tries to -- I wouldn't say severe, severe, but she is reminded constantly, everytime she turns her head, or everytime she bends her

neck.

She has insomnia, which is difficulty in sleeping. She has a distrubance of her sleep habits. People who have -- who suffer from depression have a sleep havit that is characterized by waking in the wee hours of the morning, 3:00 or 4:00; not being able to get back to sleep and having a great -- doesn't -- you can't find any -- I don't have a blood test that highly anemic. They don't have any organic or clinical reason for that, but is is a result of having -- being in a depressed state. People who have depression have very bad sleep habits and everybody who's been around people like this know about the early morning walkers. You will see them out on the street before dawn.

Q Doctor, has-- as far as her neck injury, when is it your testimony that her -- the -- as far as the pain and discomfort, it has -- over the period of, say, four years, that the pain

and discomfort are still there, is that your --

A She complains of it, yes. And I can still feel point tenderness if I press areas. I don't -- trying to avoid being technical there. Certain network of nerve tissues that supplies sensation and motion to your head and neck, and there's -- and there are places there where you can touch and if you press a little hard, have normal amount of pain. That's called point tenderness. I mean, not like you or I can touch any part of our neck and it wouldn't hurt us, but people who have this will complain of excruciating point tenderness over points where the nerves of -- this web of nerves that supply is called the cervical plexus, come out from under the muscle sheath that extends from the back of your head to your collar bone. It's called cervical plexus. And they don't -- they get point tenderness and they complain

of it. And you can pretty well reproduce it with these cases.

TESTIMONY(IN PART) OF MARIA V. O'NEILL

Q I believe when we left off, Mrs. O'Neill, you were going into the details surrounding your departure from Webb County in November of 1967.

Now, you stated that you were out of Webb County on that--on or about that day?

A Yes.

Q Now, would you again state where you were going?

A We had been in Galveston, Texas.

Q You went to Galveston, Texas?

A Yes.

Q And did you remain there for some period of time?

A For a day.

Q You remained there for the day?

A Yes.

Q And you returned--were returning to Laredo on Highway 59, is that right?

A That's right.

Q Now, at that time, who was driving the vehicle?

A I was.

Q And where were the other passengers located in the car?

A When I was driving, or when I was parked?

Q When you were driving.

A My sister was sitting in the front with me. I had the baby in the infant seat right in the middle. And then on the back was my mother, my other two children and my cousin, Sylvia Soliz.

Q Now, you proceeded--I assume you were going in--what direction were you going in when you entered the City of Goliad?

A West. Westerly.

Q You were going a westerly direction?

A Uh-huh.

Q Now, what--what--when you entered the city

limits, was the highway a four-lane, or was it a two-lane road?

A Four-lane.

Q Four-lane road. Did you remain in one lane throughout the period?

A Yes. I stayed on the north lane.

Q Now, I am going to point--or would you point to the lane? Did you remain in that lane once you came onto the four-lane highway, the--

A This is the parking lane and this is the other one?

Q Right.

A Well, I was on this lane. (indicating on the diagram).

Q You were on the northerly--

A Lane.

Q --traffic lane?

A Yes.

Q Is that right?

A. The one to the--

Q. Right. That will be the--

A. To the--

Q. --to the right?

A. Yes.

Q. Going west?

A. Yes.

Q. Now, you--where did you proceed once you--did you encounter a stop light?

A. Well, I was just coming here and I pulled over right here and parked on the parking lane, inside the parking lane, because my sister was going to make a telephone call at that mobil Station.

Q. Now, you were in the northerly traffic lane, in other words, the right lane?

A. Right. And then, I pulled over inside the parking lane and I parked.

* * *

Q Now, did you turn the engine of your car off?

A No. I just left the parking lights on and I didn't turn the engine off because I had the baby and I had the heater on.

* * *

Q All right. Now, what happened--how long after your sister left the car did the collision occur?

A Well, I would say about five minutes.

Q About five minutes?

A Yes. Yes.

Q Did you continue to leave your motor running at that time?

A Yes, sir.

Q Did you continue to leave your heater running at that time?

A Yes.

Q Did you continue to leave your parking lights on at that time?

A Yes.

Q Did you have any forewarning at all of the approaching car behind you--

A No, I was--

Q --driven by the defendant?

A I was just--we were just sitting there and I was sitting like--kind of like this. (The witness demonstrated.) And when I looked at the rear view mirror, I saw these lights coming and I just, as I saw them, they hit us. And then, after that, I just was afraid because my baby landed on the floor and I thought she was dead. And after that, I was only concerned with my baby."

POINT NO. 22 OF PLAINTIFFS' FIRST AMENDED MOTION FOR NEW TRIAL

22. The answers of the jury to the Special Issues conclusively show that the plaintiffs were denied the fair and impartial trial to which they are entitled under the Constitution and Laws of the State of Texas and of the United States of America and that the verdict was the result of passion, bias and prejudice.

TWENTY-SECOND POINT OF APPELLANTS' BRIEF TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

"TWENTY-SECOND POINT: The answers of the jury to the Special Issues conclusively show that the plaintiffs were denied the fair and impartial trial to which they are entitled under the Constitution and Laws of the State of Texas and of the United States of America and that the said verdict was the result of passion, bias and prejudice."

NINETEENTH POINT OF ERROR OF PETITIONERS' APPLICATION FOR WRIT OF ERROR TO THE SUPREME COURT OF TEXAS

"The Honorable Court of Civil Appeals erred in overruling Appellants' Twenty-Second Point of Error and in affirming the judgment of the trial court, which Twenty-Second Point of Error reads as follows:

> 'The answers of the jury to the Special Issues conclusively show that the plaintiffs were denied the fair and impartial trial to which they are entitled under the Constitution and laws of the State of Texas and of the United States of America and that the said verdict was the result of passion, bias and prejudice.' "

RULE 483 OF THE TEXAS RULES OF CIVIL PROCEDURE

"Rule 483. ORDER ON APPLICATION FOR WRIT OF ERROR

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation 'Dismissed for Want of Jurisdiction.